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IN THE
Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORP.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a party's bad faith misconduct outside of court proceedings categorically exempt from an award of attorneys' fees under the "bad faith exception" to the "American Rule" that each party ordinarily pays its own fees?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the North Star Alaska Housing Corporation. Pursuant to Rule 29.6, petitioner is not owned by any parent company, nor do any publicly held companies own 10% or more of the corporation's stock. Respondent, the United States, was defendant-appellee below.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. B, *infra*) is reported at 356 Fed. Appx. 415. The Court of Federal Claims decision (Pet. App. C, *infra*) denying petitioner's motion for attorneys' fees is reported at 85 Fed. Cl. 241. The Court of Federal Claims opinion on the merits of petitioner's underlying claims (Pet. App. E, *infra*) is reported at 76 Fed. Cl. 158.

JURISDICTION

The Federal Circuit entered its decision on December 15, 2009. Pet. App. 4a. The court of appeals denied petitioner's timely petition for

rehearing en banc on March 22, 2010. *Id.* 2a-3a. Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including July 20, 2010. App. 09A1194. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Access To Justice Act provides, in relevant part:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b).

Relevant portions of the Contract Disputes Act, 41 U.S.C. §§ 601-13, are reprinted at Pet. App. J, *infra*.

STATEMENT OF THE CASE

The government purposefully breached its contract with petitioner and refused to cure its default. Petitioner filed an administrative claim, as

required by federal law. The government then purposefully corrupted the claims-resolution process as well. As a result of this course of misconduct, petitioner was required to further pursue its remedies through an action in the Court of Federal Claims. The court found as a matter of fact that the government had acted in bad faith and ruled for petitioner on the merits of the majority of its claims.

Petitioner expended significant amounts in attorneys' fees. Petitioner moved to recover those fees based on the course of the government's bad faith conduct, which included not merely violating petitioner's rights (by breaching the contract), but also forcing petitioner to pursue the claims-resolution process both administratively (by refusing to cure the breach) and in court (by interfering with the claims process). The court recognized that several other courts of appeals would award petitioner its attorneys' fees in these circumstances. But it held that it was compelled by Federal Circuit precedent to reject petitioner's request because the government had not acted in bad faith in the court proceedings themselves. The court of appeals summarily affirmed and denied rehearing en banc.

1. In 1987, respondent United States contracted for petitioner North Star Alaska Housing Corporation to design, build, and maintain a housing project at Fort Wainwright, Alaska. Pet. App. 26a-27a. As subsequently found by the Court of Federal Claims, the United States engaged in a "prolonged campaign designed to harm North Star," through bad faith administration, poor performance, and efforts to interfere with petitioner's own performance of the contract. *Id.* 167a. The government thus pursued

and implemented its "own form of vigilante justice" and engaged in "pervasive" bad faith that "infected virtually every aspect of the administration of the Lease" and "fell far below the standard of good faith that is integral to the Federal procurement system." *Id.* 102a, 167a, 168a, 181a. Here, "bad faith plainly animated actions by key government officials that effectuated not only a breach of the covenant of good faith and fair dealing, but also many express contract provisions." *Id.* 106a.

The Contract Disputes Act, 41 U.S.C. §§ 601-13, as implemented by the Federal Acquisition Regulation System, 48 C.F.R. §§ 1.000-1.707 (2009), establishes the scheme that must be followed by a contractor which objects to the United States' contract performance. The contractor may not proceed immediately to court. Instead, it initially files an administrative "claim." The adjudicator of the claim in the first instance is the "contracting officer," 41 U.S.C. § 605(a), who is "responsible for ensuring performance of all necessary actions for effecting contracting, [and] ensuring compliance with the terms of the contract," 48 C.F.R. § 1.602-2. "The submission of a claim initiates the disputes process." John Cibinic, Jr. et al., *Administration of Government Contracts* 1252 (4th ed. 2006) (hereinafter "Cibinic et al.").

Petitioner filed a series of claims relating to the government's breach of the contract. But contrary to the contracting officer's duty to "[e]nsure that contractors receive impartial, fair, and equitable treatment," 48 C.F.R. § 1.602-2(b), the United States engaged in significant further misconduct designed to deprive petitioner of a fair adjudication of its claims.

See Pet. App. 157a-67a. As the Court of Federal Claims subsequently found, there is "clear proof" that the government "co-opted" the contracting officer who was responsible for ruling on petitioner's claims, conduct that the court characterized as "[a]mong the most troubling aspects of the case." *Id.* 157a.

Most broadly, the government "successful[ly]" "coerce[d the contracting officer] into abandoning his independence." *Id.* 164a. Army administrators repeatedly and inappropriately interjected themselves into contracting officer affairs. *Id.* 162a-63a. In addition, the Army enacted a "formal protocol . . . under which [Army staff] would review and comment on draft contracting officer decisions before they were finalized." *Id.* 162a. This process led the contracting officer to reverse at least one decision that would have held in petitioner's favor. *Id.* 163a. These actions "constituted perhaps the most pernicious form of bad faith . . . as it threatens the integrity of the dispute resolution process that is central to the government contracting system itself." *Id.* 160a.

Furthermore, "[a]pparently unsatisfied with disrupting the internal dispute mechanism, [Army officials] sought to wield other government processes to harass," including urging that petitioner be subjected to an audit by the Army's Internal Review and Audit Compliance Office. Tellingly, when this process "yielded little in the way of adverse findings," the Army nonetheless "pressed for, and obtained, a criminal investigation of the matter." *Id.* 166a. The Court of Federal Claims later concluded that this effort was, "disturbingly, . . . viewed as a way to

support the development of defenses in this litigation." *Id.* 166a n.71.

As a consequence of the government's gross misconduct, petitioner was required to seek further review of its claims in the Court of Federal Claims, *see* 41 U.S.C. § 609(a), where it filed four actions. Pet. App. 47a, 63a, 83a, 87a. Ultimately, petitioner's allegations were consolidated for an eight-day trial in 2005. *See* Pet. App. 87a-89a.

Petitioner prevailed on the majority of its claims, including specifically its allegations of breach of contract and breach of the covenant of good faith and fair dealing. *See id.* 106a. To this end, over the course of eighty-seven pages of its opinion, the court recounted the government's willful misconduct summarized above. *Id.* 167a.

The court granted petitioner substantial declaratory relief with respect to the government's breaches of contract. *Id.* 181a-82a. The court noted that it possessed limited jurisdiction to award monetary relief for certain of the claims, however, reasoning that the Contract Disputes Act's submission requirements had not been satisfied. *Id.* 89a-98a; *see id.* 179-80a. Moreover, the court rejected many of petitioner's damage calculations as "premature" because some damages, like those relating to incentive bonuses, "await[ed] further determinations on a remand." *Id.* 179a-80a.

Accordingly, the court's final judgment awarded approximately $250,000 in damages as compensation owed to North Star for incentive bonuses and certain breaches of contract. *Id.* 21a-22a. The court left it to the contracting officer to determine in the first

instance petitioner's additional damages based on the court's declaratory findings. In the subsequent proceedings, the government awarded North Star more than $1.6 million as further compensation for the government's breaches of contract. *Id.* 192a-264a; C.A. J.A. A0141-0142.

The United States did not appeal the findings that it had engaged in a pattern of gross bad faith misconduct in the administration of the contract and in the proceedings of the contracting officer, the declaratory findings, or the award of damages.

2. Petitioner timely moved in the Court of Federal Claims to recover its attorneys' fees. The Equal Access to Justice Act (EAJA) provides that the United States shall be liable for attorneys' fees in "any civil action brought by or against the United States . . . to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). In turn, this Court has held under the "bad faith" exception to the "American Rule" that a federal court has the inherent power to hold a party liable for its opponent's attorneys' fees for acts done "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417

Preliminarily, the Court of Federal Claims rejected petitioner's assertion that attorneys of the Department of Justice had acted in bad faith in the proceedings before the court itself. Pet. App. 10a-13a. But it regarded as "a closer call" whether fees

should be awarded on the ground that the government had "corrupted the administrative process." *Id.* 13a. As to that allegation, the court reiterated that there was overwhelming evidence of the government's bad faith course of misconduct, continuing through both contract performance and the subsequent adjudication of petitioner's claims by the contracting officer. *Id.* 6a. That misconduct necessitated petitioner appealing to the Court of Federal Claims. Moreover, the court recognized that certain misconduct by the government was in defiance of rulings by the court itself. *Id.* 12a (quoting the court's merits opinion, Pet. App. 140a-41a).

The court nonetheless held that it was powerless to award petitioner attorneys' fees under existing Federal Circuit precedent adopting a "restrictive view of the 'bad faith' exception" to the American Rule. Pet. App. 17a. The court read the Federal Circuit's decision in *Centex Corp. v. United States*, 486 F.3d 1369 (Fed. Cir. 2007), to hold that bad faith by the government outside the context of federal court litigation – including in "how an agency handles an administrative claim," Pet. App. 18a – is exempt as a matter of law from an award of attorneys' fees under the EAJA. *Id.* 17a.

Although it was undisputed that the United States' misconduct had infected the dispute resolution process and necessitated the court proceedings, and despite the substantial declaratory relief granted which resulted in a total award approaching $2 million, the court noted that its prior denial of "much of the relief requested by" petitioner demonstrated that even if petitioner had received "a

perfectly fair process" before the claims administrator, much of its damages claim would have been denied. *Id.* 19a. On that basis, the court opined that "it is hardly true here that, but for the bad faith, plaintiff could have avoided this action and the significant expenditure of judicial resources it entailed." *Ibid.* Finally, the court noted that the government's misconduct could be characterized as an element of petitioner's claim that respondent "had breached its covenant of good faith and fair dealing." *Ibid.*

The court recognized that the Federal Circuit's precedent, and in turn the court's own decision in this case applying that precedent, conflicts with decisions of other circuits, which are "arrayed over a spectrum." *Id.* 14a. The Ninth and Eleventh Circuits, for example, "have no problem concluding that the 'bad faith' denial of a claim is sanctionable." *Id.* 14a-15a (citing *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326 (11th Cir. 2001) (per curiam); *Brown v. Sullivan*, 916 F.2d 492 (9th Cir. 1990)). In stark contrast, cases "[a]t the other end of the spectrum . . . , in more narrowly construing the sanctioning authority, conclude that fee shifting can never be based upon 'bad faith' conduct that solely predates the litigation." *Id.* 15a.

3. On petitioner's appeal, the government did not contest the Court of Federal Claims' findings that it had breached its contract with petitioner or that it had corrupted the proceedings of the contracting officer. The government instead asserted that the judgment should be affirmed because the outcome of the case was compelled by *Centex*, *supra*. According to the United States, in *Centex* the Federal Circuit

"acknowledged the existence of out-of-circuit authority 'for the proposition that the judicial process is abused by a defendant's bad faith response to a claim for relief after the claim accrues but before the judicial process is formally invoked,'" but "did not endorse that theory." Resp. C.A. Br. 10 (quoting *Centex*, 486 F.3d at 1372 n.1). The court of appeals summarily affirmed. Pet. App. 4a-5a.

Petitioner sought rehearing en banc, arguing that further review of the case was warranted in light of the acknowledged circuit conflict over whether and to what extent out-of-court misconduct is immune from an award of attorneys' fees. Ordered to respond, the United States argued that the question had already been properly settled in the Federal Circuit by *Centex*, *supra*. *See* Resp. C.A. Opp. to Rhg. En Banc 9 ("the trial court acted consistent with *Centex*, and, in affirming the trial court's order, this Court did not overlook or misapprehend any point of law"). The court denied rehearing en banc. Pet. App. 2a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The opinions of the Court of Federal Claims establish that the government engaged in a pervasive pattern of bad faith behavior in the administration of the parties' contract and in the adjudication of petitioner's claims before the contracting officer. The direct consequence of that serious misconduct was that petitioner instituted court proceedings seeking a fair adjudication of its claims. As a consequence, petitioner unnecessarily incurred significant attorneys' fees and the judiciary's time was spent on this matter unnecessarily. The lower courts

nonetheless concluded that petitioner was ineligible as a matter of law to receive an award of its attorneys' fees under the "bad faith" exception to the American Rule.

This Court's intervention to review that holding is warranted for three reasons. *First*, the question presented is the subject of a substantial circuit conflict. The courts of appeals are starkly divided into three camps over what circumstances, if any, justify an attorneys' fee award against a party for bad faith misconduct outside of proceedings before the court itself. *Second*, the ruling below conflicts with this Court's precedents. In this case, the United States purposefully engaged in an uninterrupted course of bad faith conduct that unjustifiably forced petitioner to incur significant attorneys' fees by pursuing its rights first through the administrative claims process and subsequently in court. This Court's decisions provide that an award of attorneys' fees may be available for bad faith misconduct that, as in this case, goes beyond merely the acts that give rise to the party's claim. *Third*, the importance of the case is undeniable. The question presented can arise with respect to any party in any litigation, whether or not involving the United States. Certiorari accordingly should be granted.

I. The Question Presented Is the Subject of a Three-Way Circuit Conflict.

a. The Federal Circuit affirmed the Court of Federal Claims' judgment that petitioner was precluded from securing an award of attorneys' fees because the government did not engage in bad faith misconduct before the court itself. Pet. App. 18a-20a.

That ruling is consistent with the precedent of the Third, Seventh, and Tenth Circuits, which similarly would have held that petitioner was ineligible as a matter of law to receive an award of attorneys' fees.

In *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 391 (7th Cir. 2002) (Posner, J.), the Seventh Circuit held that the bad faith exception to the American Rule "is a residual authority, to be exercised sparingly, to punish misconduct [] occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law—designed, for example, to deter breaches of contract)." The court of appeals took care "to repeat" that a party's "behavior in the litigation itself . . . is the only lawful domain" of such awards. *Ibid.* In the view of the Seventh Circuit, seeking to award fees more broadly would amount to the impermissible assertion of "a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American Rule on the award of attorneys' fees to the prevailing party in the absence of statute." *Id.* at 390-91.

That narrow view of the availability of an award of fees also comports with the precedent of the Tenth Circuit. In *FTC v. Kuykendall*, 466 F.3d 1149 (10th Cir. 2006), that court held that fees are available only on the basis of the claims and arguments made in litigation, and even then, "[i]n order to fall within the exceedingly narrow bad faith exception to the general rule, there must be clear evidence that the challenged

claim 'is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons.'" *Id.* at 1152 (quoting *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005)). *See also Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1317 (10th Cir. 2000).

Similarly, in *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3d Cir. 1982), Mobil unsuccessfully challenged an arbitration award, but the district court found that its litigating position before the court itself was reasonable. The Third Circuit held that its conduct was immune from an award of fees because the bad faith exception to the American Rule is limited to circumstances in which "the losing party litigated in bad faith, vexatiously, or for oppressive reasons. Thus, the issue before us is whether the district court abused its discretion in specifically finding that Mobil did not demonstrate bad faith in conducting this litigation." *Id.* at 305 (citation omitted).

b. The holding of the Federal, Third, Seventh, and Tenth Circuits that conduct outside court proceedings is exempt from an award of attorneys' fees squarely conflicts with decisions of the eight other circuits to have decided the question presented. The latter rulings themselves adopt two conflicting rules.

i. The D.C., Fourth, and Eleventh Circuits broadly hold that an award of attorneys' fees may be available for bad faith conduct that gives rise to a plaintiff's substantive claim that the defendant violated a clear duty. On the facts of this case, those courts would hold that the government's purposeful

misconduct in breaching its agreement with petitioner and further corrupting the statutorily defined claims-resolution process may give rise to an award of attorneys' fees.

The Court of Federal Claims in this case itself recognized that petitioner would be permitted to pursue attorneys' fees under the precedent of the D.C. Circuit, *see* Pet. App. 15a, but the Federal Circuit rejected the D.C. Circuit's position in *Centex*, *supra*, 486 F.3d at 1372-73. *See also Cobell v. Norton*, 407 F. Supp. 2d 140, 168 (D.D.C. 2005) (noting conflict between D.C. Circuit precedent and decisions of other circuits), *mandamus granted on unrelated question*, *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). In the D.C. Circuit, an award of attorneys' fees for bad faith is not limited to cases in which misconduct "occurred in connection with the litigation," but also is available independently if a party engages in bad faith acts that were "an aspect of the conduct giving rise to a lawsuit" when the litigant violated "a clear statutory or judicially-imposed duty." *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991) (Sentelle, J.). Attorneys' fees are thus available when "a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights." *Id.* at 220. For example, that court has awarded attorneys' fees when an agency issued a regulation that contradicted a prior stipulation, leading a party to seek to enjoin the regulation. *Ibid.* *See also Nepera Chem., Inc. v. Sea-Land Serv.*, 794 F.2d 688, 702 n.102 (D.C. Cir. 1986) (citing *Schlein v.*

Smith, 160 F.2d 22, 25 (D.C. Cir. 1947)); *American Employers Ins. Co. v. American Sec. Bank.*, 747 F.2d 1493, 1502 (D.C. Cir. 1984).

The District Court for the District of Columbia rigorously adheres to that standard. Thus, in *Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36 (D.D.C. 2004) (Kennedy, J.), the court awarded fees because the government's failure to follow statutory requirements in implementing the federal Medicare+Choice program made it necessary for the plaintiff to file suit. The court explained that the government "engaged in conduct that required plaintiffs to undertake otherwise unnecessary litigation to vindicate plain legal rights." *Id.* at 39. Similarly, in *Ellipso, Inc. v. Mann*, 594 F. Supp. 2d 40, 44 (D.D.C. 2009) (Lamberth, C.J.), the court awarded the defendant attorneys' fees arising from the plaintiff's filing of a lawsuit when "the key 'fact' that [the plaintiff] used to instigate this litigation was patently false." *See also, e.g., Am. Postal Workers' Union v. USPS*, No. 09-1217, 2010 U.S. Dist. LEXIS 46488 (D.D.C. May 12, 2010); *District of Columbia v. Straus*, No. 08-2075, 2010 U.S. Dist. LEXIS 35702 (D.D.C. Apr. 12, 2010).

The Eleventh Circuit has in turn expressly adopted the D.C. Circuit's standard. *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (per curiam) ("recogniz[ing] bad faith where 'a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights'" (quoting *Am. Hosp.*, 938 F.2d at 220)).

Similarly, the Fourth Circuit long ago adopted the rule that the defendant's primary conduct underlying the claim may itself give rise to an award of attorneys' fees. *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963) (school board's "long continued pattern of evasion and obstruction" to desegregation was "so extreme" as to justify shifting fees); *Rolax v. Atl. Coast Line R.R. Co.*, 186 F.2d 473 (4th Cir. 1951) (awarding attorneys' fees against labor organization that entered into racially discriminatory labor agreement). That court has continued to adhere to that rule. *Williams v. Prof'l Transp., Inc.*, 294 F.3d 607, 614 (4th Cir. 2002).

ii. The Second, Fifth, Sixth, Eighth, and Ninth Circuits have adopted an intermediate position under which generally – with some variation between the courts of appeals – a party may receive an award of attorneys' fees based on bad faith misconduct that is related to the course of the litigation, although that misconduct *need not* have occurred in the lawsuit *itself*. These courts would hold that the court has the power to award attorneys' fees in this case because the government's misconduct compelled petitioner to pursue its claims administratively and in the Court of Federal Claims.

The Fifth Circuit rejects both the position that fees are narrowly available only for bad faith in the conduct of the court proceedings, as well as the opposite rule that fees broadly may be awarded purely for bad faith conduct giving rise to the claim. That court instead has adopted the middle ground position that "the requisite bad faith may be found in a party's conduct *in response* to a substantive claim,

whether before or after an action is filed, but it may not be based on a party's conduct *forming the basis* for that substantive claim." *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (emphases in original).

Under that standard, the Fifth Circuit notably holds that governmental misconduct in the administrative process may be a basis for an award of attorneys' fees. Thus, in *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992), the court held that on remand the district court was empowered to award attorneys' fees against the government when "(1) the INS used inappropriate factors to adjudicate requests for relief; (2) the INS retaliated against class members through deportation proceedings; and (3) the INS failed to timely adjudicate requests for relief after promising to change this policy." Similarly, in *Baker v. Bowen*, 839 F.2d 1075, 1082 (5th Cir. 1988), in which a plaintiff sought Social Security benefits, the Fifth Circuit held that the administrative "Appeals Council failed to fulfill [its] statutory duty when it affirmed the ALJ, perfunctorily and automatically, without reviewing all the evidence," and that the plaintiff was entitled to attorneys' fees because had the appeals council fulfilled "its duty, there would have been no litigation in this case." *Ibid.*

The Second Circuit has expressly adopted the Fifth Circuit's holding. The Second Circuit holds that "the point at which a complaint is filed does not mark the line between conduct that may or may not be considered in awarding fees for bad faith." *Kerin v. USPS*, 218 F.3d 185, 195 (2d Cir. 2000). In *Kerin*, for example, the court held that an attorneys' fees award was available based on the allegation that the

government had refused to recognize a valid claim and thereby forced the plaintiff to litigate. *Id.* at 195-96.

The Eighth Circuit adopted the same rule in *McLarty v. United States*, 6 F.3d 545, 549 (8th Cir. 1993). That court has further specified that if the "bad faith" of a party "necessitat[ed] that an action be filed," attorneys' fees are available. *Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997) (discussing *Richardson v. Commc'ns. Wkrs.*, 530 F.2d 126, 132 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976)). It is similarly sufficient that a party had brought a frivolous claim in bad faith. *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990). There is in fact authority in the Eighth Circuit supporting application of the D.C. Circuit's broad rule that fees are available for conduct that underlies the plaintiff's cause of action. *U.S. SEC v. Zahareas*, 374 F.3d 624, 627 (8th Cir. 2004) (award of attorneys' fees is not limited merely to cases involving bad faith conduct "in connection with the litigation," but is also available for bad faith that "was an aspect of the conduct giving rise to the lawsuit").

The Ninth Circuit has held that a party generally may not recover fees "solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit," *Ass'n of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 550 (9th Cir. 1992), but it has squarely held that misconduct in an administrative review process will justify an award of fees. Thus, in *Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990), an administrative law judge awarded the plaintiff disability benefits. That ruling was

automatically subject to administrative review before an Appeals Council, which reversed without the benefit of a transcript and without providing certain evidence to the plaintiff. The Ninth Circuit held that this bad faith conduct by the government entitled the plaintiff to attorneys' fees, reasoning that the government's conduct violated the "process for review of benefit allowances," which is "statutorily defined." *Ibid.* That misconduct "created delays and necessitated [the plaintiff's] filing the first action in the district court." *Ibid.*

Finally, the Sixth Circuit applies yet a different rule that is distinctly more stringent. That court holds that fees are not available for bad faith giving rise to the plaintiff's claim; conversely, although the basis for a fee award is not limited to litigation misconduct, "the bad faith exception does not apply where there is no bad faith *after* the original claim arises." *Shimman v. Int'l Union of Oper. Eng'rs*, 744 F.2d 1226, 1232 (6th Cir. 1984) (en banc) (emphasis added). The pervasive circuit conflict over the question presented is illustrated by the fact that the D.C. Circuit has expressly rejected the Sixth Circuit's more stringent position. *See Nepera*, 794 F.2d at 701 n.102.

c. In sum, the eligibility of a party for an award of attorneys' fees for the bad faith misconduct of its opponent outside the proceedings before the court depends entirely on the pure happenstance of the particular circuit in which the case is litigated. Eight different circuits – all of which reject the narrow rule that only bad faith conduct in the litigation itself may give rise to a fee award – would have held in this case that the government's gross misconduct could be the

basis for petitioner to recover the significant attorneys' fees it was forced to expend unnecessarily in pursuing its administrative and judicial remedies. The principal role of this Court's certiorari jurisdiction is to resolve just such conflicts, and the Court's intervention is plainly warranted.

II. The Ruling Below Conflicts with This Court's Precedents.

This Court has held under the "bad faith" exception to the "American Rule" that a federal court has the inherent power to hold a party liable for its opponent's attorneys' fees for acts done "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)). The lower courts held as a matter of law that this power applies only if the bad faith misconduct occurs before the court itself. That narrow conception of the federal courts' inherent power is unwarranted.

In *Vaughn v. Atkinson*, 369 U.S. 527 (1962), the Court held that an award of attorneys' fees was appropriate because the defendant had refused to pay the plaintiff maintenance and cure required by maritime law. The Court reasoned that the plaintiff was "forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." *Id.* at 531.

Subsequently, in *Hall v. Cole*, 412 U.S. 1, 15 (1973), this Court held that in awarding fees "'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."

In reaching that conclusion, the Court favorably cited the Fourth Circuit's decisions awarding attorneys' fees on the basis of bad faith conduct giving rise to the plaintiff's claim, *see Bell* and *Rolax*, *supra*, describing those decisions as reflecting the "unquestioned" power of a federal court to "award counsel fees to a successful party when his opponent has acted" in bad faith. *Id.* at 5. In *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 706, 721 (1974), the Court reaffirmed "the common-law availability of an award" in such circumstances.

This Court moreover summarily affirmed an award of attorneys' fees necessitated by the Alabama legislature's efforts to avoid reapportioning voting districts as required by the Fourteenth and Fifteenth Amendments. *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). The district court reasoned that these fees were justified either because of the State's bad faith, 340 F. Supp. at 693-94, or because of "far broader considerations of equity" arising from the plaintiff's role as "private attorneys general," *id.* at 694. Subsequently, in *Alyeska*, this Court rejected the assertion that *Sims* rested on the "private attorney general" concept, explaining that "there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees." 421 U.S. at 270-71 n.46.

Even if, contrary to those precedents, the inherent power to grant fees were limited to cases of bad faith conduct before the court, petitioner would be eligible for such an award in this case. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court squarely held that the EAJA's attorneys' fees provisions extend to proceedings before an administrative

agency that is part of a claims-resolution process. The Court reasoned:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

Id. at 888. In reaching that conclusion, the Court relied on prior decisions holding that fees were available under the Clean Air Act for "the costs of representation before federal and state administrative agencies," *id.* (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986)), as well as under Title VII "for services performed in state administrative and judicial enforcement proceedings," *id.* at 888-89 (citing *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)).

Applied to this case, this Court's precedents provide that the government is subject to an award of attorneys' fees for violating its clear obligations by breaching its contract with petitioner and for corrupting the proceedings before the contracting officer. The Court's rulings in *Vaughn*, *Hall*, and *Sims* establish that a federal court's inherent power to award fees extends to cases in which a party is forced to institute litigation because of its opponent's purposeful violation of clear legal rights. The bad faith exception in part serves to make a party "whole

for expenses caused by his opponent's obstinacy." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

This is such a case. The government engaged in gross bad faith behavior that forced petitioner to file a claim under the Contract Disputes Act. The government then continued in its outrageous course of conduct, corrupting the statutory claims resolution process, preventing a fair adjudication by the contracting officer, and requiring petitioner to pursue its further remedies before the Court of Federal Claims.

Petitioner's eligibility for fees is all the more clear because in a case under the Contract Disputes Act the proceedings before the contracting officer are "intimately tied" with the judicial process. *Sullivan*, 490 U.S. at 888. Given the "interlocking system of judicial and administrative avenues to relief," the "exclusion" of the proceedings before the contracting officer "from the fee provisions would clearly clash with the congressional design behind the statutory scheme whose enforcement the fee-shifting provisions was designed to promote." *Id.* at 889. The design of the statutory scheme is to "equalize the bargaining power of the parties [to a government contract] when a dispute exists; . . . and insure fair and equitable treatment to contractors and government agencies." S. Rep. No. 95-1118 (Aug. 15, 1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235. Specifically, as the individual responsible for resolving disputes between contractors and the government, a contracting officer serves as a "quasi-judicial official when rendering a final decision." Cibinic et al., *supra*, at 1286. In this

role, the contracting officer's duty to provide "impartial, fair, and equitable treatment" (48 C.F.R. § 1.602-2(b) (Oct. 1, 2009)) requires that he "act impartially," not "as a representative of one of the parties" (*Penner Installation Corp. v. United States*, 116 Ct. Cl. 550, 557 (1950)).

In this case in particular, the administrative and judicial proceedings were intimately related. After petitioner was forced to institute proceedings before the Court of Federal Claims, the government willfully acted in contravention of the court's rulings. The court specifically found that the government engaged in misconduct in direct response to rulings by the court favorable to petitioner and that that malfeasance deprived petitioner of compensation to which it was entitled. *See* Pet. App. 140a-41a. Moreover, despite an absence of "adverse findings," Army officials utilized internal and criminal investigative resources to "delay resolution of this case by more than a year, during which period [they] continued to abuse [petitioner] on an almost daily basis." Pet. App. 166a. The government viewed this misconduct "as a way to support the development of defenses *in this litigation*." *Id.* 160a (emphasis added). As the Court of Federal Claims recognized, this "most pernicious form of bad faith . . . threatens the integrity of the dispute resolution process that is central to the government contracting system itself." Pet. App. 155a. The Federal Circuit's conclusion that the federal courts are powerless to sanction such a course of ongoing bad faith misconduct that occurs in the midst of, and is directly related to, judicial proceedings is meritless.

Holding the government categorically immune from an award of fees in these circumstances would furthermore conflict with Congress's "premise" in enacting the EAJA: "that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 96-1418 (Sept. 26, 1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4986-87. Congress feared that "the government, with its greater resources and expertise can in effect coerce compliance with its position." 1980 U.S.C.C.A.N. at 4988. By interposing a contracting officer as an intermediate step in the process of adjudicating disputes over government contracts, Congress did not intend to heighten the already significant inequality in resources and deter private parties from vindicating their rights against the government.

The negative consequences of the Federal Circuit's ruling for the public fisc are apparent as well. If the government is able to leverage its vast legal resources through bad faith dispute resolution, the resulting risk premium required by parties who enter into agreements with the government will necessarily increase.

Nor does the government conveniently acquire immunity from an award of fees for its pervasive bad faith misconduct because petitioner did not prevail on all of its claims before the Court of Federal Claims. In point of fact, the court ruled for petitioner on the merits of most of its allegations. Although the court disagreed with the opinion of petitioner's damages

expert, the fact that petitioner was ultimately awarded nearly $2 million in damages in the case shows that its claims were significant and meritorious.

But in any event, the fact that petitioner did not entirely prevail before the Court of Federal Claims is not relevant to its right to attorneys' fees. "A court's inherent power to award attorney's fees pursuant to the bad faith exception 'depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.'" *Lamb*, 103 F.3d at 1435 (quoting *Chambers*, 501 U.S. at 53). In this case, an award of fees is appropriate because the government's bad faith conduct deprived petitioner of the fair adjudication of its claims to which it was entitled before the contracting officer, necessitating a "significant expenditure of judicial resources" (Pet. App. 19a) in the course of petitioner's appeal.

Nor is there merit to the Court of Federal Claims' remaining suggestion (*ibid.*) that petitioner's success on the merits of its claim that the government breached the covenant of good faith and fair dealing could perversely *disentitle* petitioner to an award of attorneys' fees. There is no basis in law or logic to hold that, although a party's bad faith misconduct generally subjects it to an award of fees, that sanction must be denied whenever the plaintiff proves bad faith as an element of its substantive claim. An award of attorneys' fees vindicates the judiciary's interest in the integrity and efficiency of the legal process – including in cases in which a party in bad faith forces its opponent to institute litigation unnecessarily. In this case, the damages awarded to petitioner on its substantive claims related

exclusively to the government's breach of the parties' contract; those damages did not in any respect purport to compensate petitioner for the significant attorneys' fees that petitioner incurred as a result of the government's gross misconduct.

Because the ruling below conflicts with this Court's precedents and Congress's design in enacting the Contract Disputes Act and the EAJA, certiorari is warranted.

III. The Importance of the Question Presented Is Manifest.

This Court's intervention is finally warranted because the question presented has the potential to arise in any case litigated in federal court, whether or not the government is a party. The EAJA provides that the United States shall be liable for attorneys' fees in "any civil action brought by or against the United States . . . to the same extent that any other party would be liable under the common law or under the terms of any statute that provides for such an award." 28 U.S.C. § 2412(b). The numerous federal appellate rulings giving rise to the conflict between the circuits, *see* Part I, *supra*, demonstrates that the issue recurs with great regularity.

The importance of this case is only heightened by the fact that it arises from the Federal Circuit, which exercises exclusive jurisdiction over government contract disputes. *See* 41 U.S.C. §§ 607(g)(1)(a), 609(a)(1). The Federal Circuit's narrow conception of the court's power to award attorneys' fees is a distinctly minority view, yet it governs all contractual relationships between private parties and the government. In 2008, the government spent over

$500 billion on contracts with private individuals. *See* Memorandum for the Heads of Executive Departments and Agencies, Government Contracting, 74 Fed. Reg. 9755 (Mar. 4, 2009).

Finally, this case presents an ideal vehicle through which to resolve this circuit conflict. Petitioner is a government contractor litigating a purely federal question – the proper application of the Equal Access to Justice Act to the bad faith exception to the American Rule recognized by this Court. Accordingly, this appeal does not involve the potentially thorny terrain of applying a federal fee-shifting rule to a violation of state substantive law, which would implicate the "very different situation [that] is presented when a federal court sits in a diversity case." *Alyeska*, 421 U.S. at 259 n.31; *see also Montgomery Ward & Co. v. Pac. Indem. Co.*, 557 F.2d 51, 57 n.8 (3d Cir. 1977).

Further, the Court in this case can decide the question of law of the circumstances in which attorneys' fees are available under the bad faith exception to the American Rule without resolving whether such an award is appropriate on the facts of this particular case. The Court of Federal Claims' initial findings, subsequently reaffirmed by the court in its opinion addressing petitioner's claims to attorneys' fees, establish that the government engaged in pervasive bad faith both in the administration of the contract and the adjudication of petitioner's claim. Those findings demonstrate, at the least, that petitioner's claim to attorneys' fees is substantial. After resolving that the lower courts erred in holding as a matter of law that petitioner is categorically ineligible for an award of fees, this

Court can remand for a determination of whether an award is appropriate on the facts of this case and what portion of petitioner's fees should be awarded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 20, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-5054

Filed: March 22, 2010

NORTH STAR ALASKA HOUSING CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 98-CV-168, 02-CV-1632, 03-CV-2699, Judge Francis M. Allegra.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 29, 2010.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: 03/22/2010

cc: Thomas C. Goldstein
Timothy P. McIlmail

NORTH STAR ALASKA HOUSING V US, 2009-5054
(CFC-98-CV-168)

APPENDIX B

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

NORTH STAR ALASKA HOUSING CORPORATION, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 2009-5054.

Dec. 15, 2009.

Appealed from United States Court of Federal Claims, Case Nos. 98-CV-168, 02-CV-1632, 03-CV-2699, Francis M. Allegra, Judge.

Paul W. Killian, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief was Mark J. Groff.

Timothy P. McIlmail, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Donald E. Kinner, Assistant Director.

LOURIE, LINN, and MOORE, Circuit Judges.

Judgment

PER CURIAM.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

APPENDIX C

United States Court of Federal Claims

NORTH STAR ALASKA HOUSING CORPORATION, Plaintiff,
v.
The UNITED STATES, Defendant.
Nos. 98-168C, 02-1632C, 03-2699C.

Jan. 9, 2009.

ORDER

ALLEGRA, Judge.

On March 7, 2007, this court held that the United States had breached its covenant of good faith and fair dealing in administering an Army housing contract with North Star Alaska Housing Corporation (North Star). *North Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 189-212 (2007). Relying on a wealth of evidence, this court found that defendant's representatives acted with animus in a fashion calculated to hinder plaintiff's performance. *Id.* Among the actions cited by the court was defendant's abuse of the claim resolution process required by the Contract Disputes Act. *Id.* at 208-12. Judgment in favor of plaintiff was entered on April 15, 2008. Defendant did not prosecute an appeal.

On June 18, 2008, plaintiff filed a motion for attorney's fees and litigation expenses, invoking 28 U.S.C. § 2412(b). Defendant filed its response in opposition to the motion on August 4, 2008. Plaintiff

filed its reply on August 21, 2008. Argument on the motion is deemed unnecessary.

I.

Absent a statute or enforceable contract provision, fee shifting is generally prohibited, with each party instead ordinarily bearing its own attorney's fees. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975). This so-called "American Rule" is founded on the belief that requiring an unsuccessful litigant to pay the litigation expenses of the prevailing party would unduly deter parties from seeking to "vindicate their rights" in a judicial forum. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *see also Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (in which this rule originated). Over the years, however, courts have recognized limited exceptions to this rule, among them that a court may use its inherent power to assess attorney's fees "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers*, 501 U.S. at 45-46, (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)); *see also Alyeska*, 421 U.S. at 258-59. Section 2412(b) of Title 28, a provision of the Equal Access to Justice Act (EAJA), extends this concept to the United States, subjecting it to the award of attorney's fees in civil cases "to the same extent that any other party would be liable under the common law ... for such an award." See also H.R. Rep. No. 96-1418, at 9 (1980) (section 2412(b)

"reflects a strong movement by Congress toward placing the federal government and civil litigants on completely equal footing"); *Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 190 (2d Cir. 2000).

The "bad faith" exception to the American Rule serves the "dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Chambers*, 501 U.S. at 46 quoting *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978)); see *Chambers*, 501 U.S. at 74 (Kennedy, J., dissenting) (bad faith exception to American Rule "permits fee shifting as a sanction to the extent necessary to protect the judicial process"). Such an award is punitive in nature and should be imposed only in exceptional cases and for dominating reasons of justice. *See Hall v. Cole*, 412 U.S. 1, 5 (1973); *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 946 (D.C. Cir. 1984). Under this exception, it is appropriate to assess attorney's fees when the court finds that "fraud has been practiced upon it, or that the very temple of justice has been defiled[.]" *Univ. Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946). Such a sanction is also appropriate when a party, in bad faith, delays or disrupts litigation or hampers the enforcement of a court order. *Chambers*, 501 U.S. at 46. The "bad faith" exception thus applies "to a full range of litigation abuses," *id.*, and "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Id.* at 53; *see also Hutto*, 437 U.S. at 689 n. 14.

In keeping with these sentiments, the Federal Circuit recently concluded that "fee awards cannot be assessed based on claims of bad faith primary conduct," i.e., "conduct that forms the basis for the substantive claim for relief." *Centex Corp. v. United States*, 486 F.3d 1369, 1371 (Fed. Cir. 2007); *see also Consumers Energy Co. v. United States*, 84 Fed. Cl. 670, 676-77 (2008). The Federal Circuit noted that its view was shared by at least eight other circuit courts.[1] *Centex* reasoned that "authorizing a court to

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[1] The Federal Circuit cited a variety of cases for this proposition, including the following: *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 391 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003) (holding that "behavior in the litigation itself is the only lawful domain of the relevant concept of 'inherent authority'"); *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 765 (10th Cir. 1997) ("[A]n award of attorneys' fees may not be premised solely on prelitigation conduct."); *Lamb Eng'g & Constr. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997) ("[A court] may not base an [attorney's fees] award solely on the conduct that led to the substantive claim."); *Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 976 F.2d 541, 550 (9th Cir. 1992) ("[N]o federal appellate authority in or out of the Ninth Circuit has clearly approved an order shifting attorney's fees based solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit. We decline to do so."); *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) ("We hold that the requisite bad faith ... may not be based on a party's conduct forming the basis for [the] substantive claim.") (emphasis omitted); *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1014 (11th Cir. 1985) ("Vexatious conduct inherent in the fraudulent acts that make up the 10b-5 cause of action cannot be the basis for an attorney's fee award"); *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1233 (6th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985) ("We therefore hold that the bad faith exception to the American Rule does not allow an

shift fees based solely on bad faith conduct that forms the basis for the substantive claim for relief would undermine the American Rule by penalizing a party who raises good faith defenses to claims of liability for bad faith conduct." 486 F.3d at 1372; *see also id.* (expressing a desire to "protect a defendant's right to go to court and argue a non-frivolous defense to a claim, even if the claim arose from the defendant's bad faith conduct"). The court also categorically rejected arguments that the EAJA was intended to "alter the common law fee-shifting rule," emphasizing instead that, as under the common law, "[f]ee-shifting is not permitted for bad faith conduct that precedes the accrual of the claim in question." *Id.* at 1375. *Centex* thus suggests that the bad faith exception ordinarily applies only if some bad faith conduct occurs in the context of litigation.

II.

Seemingly undaunted by the limitations inherent in this holding, plaintiff asseverates that attorney's fees are warranted here because defendant proceeded in bad faith in several critical regards. First, it asserts that fees are recoverable here because defendant's prior counsel, Mr. Donald Kinner,

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award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim."); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256, 262-63 (1st Cir. 1976), *cert. denied*, 429 U.S. 978 (1976) (disapproving the position that the bad faith exception extends to bad faith in the events giving rise to litigation).

exhibited bad faith in the conduct of this litigation by: (i) advising the Army to extend its practice of reducing the reimbursements paid for replacing carpet damaged by occupants to reflect the age of the carpeting--a practice the parties referred to as "depreciation;" and (ii) triggering, or at least promoting, a criminal investigation of plaintiff's conduct that caused the court to stay this action for nearly a year (and which ultimately resulted in no indictments). Second, plaintiff contends that fees should be imposed because the Army corrupted the contract claim resolution process, inappropriately coercing the contracting officers into denying various contract claims filed by plaintiff. For its part, however, defendant contends that all the conduct identified by the plaintiff was "primary conduct" that formed the "basis for the substantive claim for relief" here. It argues that, under *Centex*, such conduct provides no basis for assessing attorney's fees under the "bad faith" exception to the American Rule. And it asserts that much of the conduct identified by plaintiff as the basis for its fee claim simply was not characterized by the court as being in bad faith.

A.

The latter point bears emphasis at the outset. In fact, the court did not find--and plaintiff did not prove--that Mr. Kinner engaged in any bad faith conduct regarding the Army's decision to extend its depreciation practice to other occupant-damaged items replaced by plaintiff. As this court previously described, the Army's initial decision to reduce the

reimbursement associated with replacing carpeting initially was supported by at least one decision of this court that had allowed such depreciation. *North Star*, 76 Fed. Cl. at 201 (citing *West Carthage Assocs. v. United States*, No. 00-622C (Fed. Cl. May 30, 2002)). Based, *inter alia*, upon the existence of this precedent, the court found that the Army's initial decision to adopt the depreciation practice was not motivated by animus. *North Star*, 76 Fed. Cl. at 202. The court, however, went on to find that--

> Over time, however, this practice took on new dimensions. Particularly as viewed through the prism of the many statements of animus in the record, it is clear the use of depreciation clearly became yet another weapon by which Mr. Peterson, Ms. Kiser and others could effectuate their animus toward North Star. And this certainly was true by the time that these officials, responding to a July 3, 2002, ruling by this court shedding considerable doubt on the legality of the depreciation practice, extended depreciation to counter tops, vinyl and other types of materials installed in the units.

North Star, 76 Fed. Cl. at 202. This findings thus hinged on statements reflecting animus made by Mr. Peterson, Ms. Kiser and other Army officials. *Id.* But, the record contained no such statements made by Mr. Kinner. Indeed, it is conceivable, if not likely, that he urged the extension of the depreciation practice merely in an effort to make the Army's practices with respect to carpet and other items legally consistent. That seemingly is the sort of tactical decision--in itself reasonable--that *Centex*

intended to protect. At all events, absent any specific finding that Mr. Kinner acted in bad faith regarding the depreciation issue, there is no basis upon which to impose attorney's fees here predicated upon his participation in the extension decision.

Nor did the court determine that Mr. Kinner acted in bad faith in seeking a criminal investigation of plaintiff's conduct. While the circumstances surrounding the genesis of that investigation are admittedly bothersome, it remains that the court did not find--and plaintiff most certainly has not shown--that the investigation itself, any actions taken by defendant's prior counsel (or other Justice Department officials) in pursuit thereof, or any resulting delay, were the result of bad faith. *North Star*, 76 Fed. Cl. at 211; *see also United States v. Ford*, 737 F.2d 1506, 1510 (9th Cir. 1984) (fee movant bears the burden of establishing an opponent's bad faith); 10 James Wm. Moore, MOORE'S FEDERAL PRACTICE ¶ 54.171[2][c] (3d ed. 2008) (citing additional cases). As such, plaintiff second allegation also lacks the factual predicates necessary to bring it within the bad faith exception to the American Rule.

B.

A closer call is presented by plaintiff's final banner claim--that it is entitled to attorney's fees because defendant corrupted the administrative claim process. This court found that bad faith permeated the Army's conduct in this regard. *North Star*, 76 Fed. Cl. at 208-12. Moreover, the Federal Circuit, in *Centex*, left open the question whether "the judicial

process is abused by defendant's bad faith response to a claim for relief after the claim accrues but before the judicial process is formally invoked." 486 F.3d at 1372 n. 1. This response, of course, begs further inquiries regarding the proper contours of the sanctioning authority represented by the "bad faith" exception.

The judicial thinking on that subject can be arrayed over a spectrum. On one end of that spectrum are those circuits that liberally construe the sanctioning authority to reach virtually any form of "bad faith" conduct, freely including that which predates the litigation. Plaintiff cites two cases that lie on this end of the spectrum--*Maritime Management, Inc. v. United States*, 242 F.3d 1326 (11th Cir. 2001) and *Brown v. Sullivan*, 916 F.2d 492 (9th Cir. 1990). In *Maritime Management*, the Eleventh Circuit affirmed a district court finding that the United States had acted in bad faith by delivering an incomplete administrative record to the General Accounting Office in a bid protest. *Maritime Mgmt.*, 242 F.3d at 1333-34. And in *Brown*, the Ninth Circuit upheld sanctions based upon a Department of Health and Human Services program that systematically reviewed the decisions of administrative law judges in terms of the ratio of benefits allowed to benefits denied--a program that the district court had found was adopted in "bad faith." *Brown*, 916 F.2d at 496-97. Both cases employed the broad view of the bad faith exception--the one that permits fee shifting even where the bad faith was solely an aspect of the conduct giving rise to the lawsuit. *See Maritime Mgmt.*, 242 F.3d at 1333; *Brown*, 916 F.2d at 496. Not surprisingly, decisions at this end of the spectrum have no problem in

concluding that the "bad faith" denial of a claim is sanctionable. Take, for example, *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216 (D.C. Cir. 1991), in which the D.C. Circuit held that the bad faith exception may be invoked where "a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights." *Id.* at 220 (citation omitted); *see also S.E.C. v. Zahareas*, 374 F.3d 624, 627 (8th Cir. 2004); *Cobell v. Norton*, 319 F.Supp.2d 36, 43-44 (D.D.C. 2004).

At the other end of the spectrum are decisions that, in more narrowly construing the sanctioning authority, conclude that fee shifting can never be based upon "bad faith" conduct that solely predates the litigation. *See Zapata*, 313 F.3d at 391 (this power is "is to be exercised sparingly, to punish misconduct ... occurring in the litigation itself, not in the events giving rise to the litigation"); *Ass'n of Flight Attendants*, 976 F.2d at 549. These cases are particularly sensitive to the limitations associated with a court's use of inherent power, drawing support, in this regard, from the various opinions in *Chambers*. They often cite, *see, e.g., Towerridge*, 111 F.3d at 766, the majority's statement in *Chambers* that ("[t]he imposition of sanctions under the bad-faith exception depends ... on how the parties conduct themselves during the litigation.") 501 U.S. at 46. They also rely, *see, e.g., Ass'n of Flight Attendants*, 976 F.2d at 549, on Justice Kennedy's dissent, in which he more pointedly stated--

> When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

Chambers, 501 U.S. at 74 (Kennedy, J. dissenting); *see also id.* at 60 (Scalia, J., dissenting).[2]

Tending toward this end of the spectrum are also decisions that, owing to a general hesitancy to sanction prelitigation conduct, refuse to assess fees based upon the underlying conduct that gave rise to the substantive claims in the case, but admit that there might be extreme circumstances in which conduct predating the litigation so impacts the integrity of the subsequent judicial proceedings as to give rise to fee-shifting. *Compare F.D.I.C. v.*

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[2] The majority opinion in *Chambers* declined to reach the question whether the "bad faith" exception applied to prelitigation conduct, as it viewed the district court's sanction there as applying only to post-litigation conduct. 501 U.S. at 54-55 & n. 16. The dissenters disagreed with this point, prompting them to define more directly the scope of the sanctioning authority. *Id.* at 74 (Kennedy, J., dissenting). It should be noted that the statements in *Chambers* are not inconsistent with *Vaughan v. Atkinson*, 369 U.S. 527 (1962). To be sure, the Supreme Court allowed an attorney's fee award there because the defendants had callously refused to pay maintenance and cure. *Id.* at 530-31. But, as the Federal Circuit noted in *Centex*, 486 F.3d at 1373, that award was based upon long-standing admiralty principles, which envisioned the recovery of attorney's fees in the case as an aspect of damages.

Maxxam, Inc., 523 F.3d 566 (5th Cir. 2008) with *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989); *see also* 10 MOORE'S FEDERAL PRACTICE at ¶ 54.171[2][c][ii] (advocating this more limited view). The varying results in the latter cases often hinge not so much upon differing views of the law, as upon factual nuances and deference to district court findings regarding the impact of prior "bad faith" conduct on a given court proceeding.

Several reasons convince the court that the more restrictive view of the "bad faith" exception ought to apply here. First, this view is more in accord with the rationale expressed in *Centex*. After all, the Federal Circuit refused to follow *American Hospital* and clearly aligned itself with those circuits that have held that an award of attorney's fees may not be premised on prelitigation conduct unless that conduct somehow directly impacts the judicial process. *Centex*, 486 F.3d at 1371-73. Second, this narrower view recognizes not only that the imposition of "bad faith" sanctions ought to be rare, but that that is the case because it involves the exercise of the court's inherent authority. That authority is highly limited and exists only to the extent necessary to ensure the proper functioning of the court, that is, to address actions that affect the exercise of judicial authority, relate to the behavior of the parties and attorneys in the litigation before the court, or otherwise "degrade the judicial system." *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 523 F.3d 1374, 1381 (Fed. Cir. 2008), *cert. denied*, --- U.S. ----, 129 S.Ct. 279 (2008).[3]

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[3] See also *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 378 (Fed. Cir. 1994) ("Without a finding of fraud or

Giving effect to these limitations seemingly requires the court to forego punishing prelitigation conduct that does not significantly impact the integrity of the proceedings before it. Finally, it should not be overlooked that an approach that predicates fee liability based solely on how an agency handles an administrative claim threatens to expose the government to greater fee liability than its private counterparts. The latter, of course, generally do not employ formal claim processes. And even where such processes exist, usually through contracts, courts have been hesitant to impose fees based solely on the bad faith administration of those provisions. *See Lamb*, 103 F.3d at 1436-37 (relying on *Chambers* in holding that the bad faith administration of a contract "does not provide a basis upon which the court may use its inherent power to award attorney fees"). As such, readily imposing liability on the government in such circumstances likely violates that part of section 2412(b) which instructs that "the United States shall be liable for [attorney's fees] to the same extent that any other party would be liable under the common law."

Under this narrower view of the "bad faith" exception, the Army's "bad faith" conduct as to the claims process here does not support the imposition of attorney's fees. For one thing, even though that process plainly was conducted in bad faith, many, if not all, of plaintiff's claims would have been denied--

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bad faith whereby the 'very temple of justice has been defiled,' the court enjoys no discretion to employ inherent powers to impose sanctions."); *Zapata*, 313 F.3d at 391.

and, in some instances, should have been denied--even in a perfectly fair process. This court said as much in its prior opinion, in which it rejected much of the relief originally requested by plaintiff in its CDA claims, including plaintiff's claim that it was entitled to damages for the loss of its business value, by far the most dollar-intensive of its claims. *See North Star*, 76 Fed. Cl. at 213-17. And there is no assertion (or proof) that defendant acted in "bad faith" in defending against the claims that this court sustained--again suggesting that virtually all the claims here would have been denied even in a "good faith" process. As such, unlike cases like *American Hospital*, it is hardly true here that, but for the bad faith, plaintiff could have avoided this action and the significant expenditure of judicial resources it entailed. In other words, this is not a case in which the identified conduct directly impacted the integrity of the judicial process. Moreover, while the court does not believe, as defendant intimates, that *Centex* requires that anything pled as part of a complaint becomes, by virtue of that fact, part and parcel of a substantive primary claim, here, the fact remains that the Army's perversion of the claims process was an integral part of plaintiff's argument that defendant had breached its covenant of good faith and fair dealing and, concomitantly, of the court's findings in that regard. As such, the "bad faith" conduct in this regard appears to fall squarely within the category which *Centex* holds cannot form the basis for a "bad faith" fees claim.

Plaintiff makes a variety of other lesser allegations in support of its fee request--for example, that bad faith warranting fee shifting was exhibited when, at trial, certain witnesses testified in contradiction to

hard evidence, or when the government allegedly used the criminal investigation to supplement inappropriately its discovery. But, these allegations are just that--allegations--unsupported by any evidence evincing bad faith. Other claims made by plaintiff--for example, that certain Army officials falsified project records--again represent primary conduct supporting substantive bad faith contentions in the lawsuit at issue or in one of the subsequent lawsuits that plaintiff filed with respect to this same contract. As such, like plaintiff's principal allegations, none of these other assertions supports an award of attorney's fees.

III.

Based on the foregoing, the court DENIES plaintiff's motion for attorney's fees and litigation expenses.

IT IS SO ORDERED.

APPENDIX D

Case 1:98-cv-00168-FMA Document 361
Filed: 04/15/2008

In the United States Court of Federal Claims

No. 98-168 C

NORTH STAR ALASKA HOUSING CORPORATION,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed March 7, 2007, the parties' Joint Status Report Proposing Judgment, filed on May 4, 2007, defendant's filing of Incentive Fee Decisions on June 21, 2007, and the court's April 14, 2007 Order Directing Judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of the plaintiff in the following amounts:

A. For the fire that occurred at 765 Bataan Court on August 23, 1996, $15,695.63, plus interest on that amount as provided in the Contract Disputes Act (CDA), calculated from September 12, 1996;

B. For rent reductions based upon alleged excess downtime for February through June 2002, $7,506.33, plus interest on that amount as provided in the CDA, calculated from September 4, 2002; and

C. For incentive fees for contract performance year 1998, $56,667.00, plus interest on the amount as provided in the CDA, calculated from March 29, 1999.

IT IS FURTHER ORDERED AND ADJUDGED that the court declares that plaintiff is entitled to receive the following incentive fees:

A. For incentive fees for contract performance year 1999, $55,437.00, plus any interest as provided by law;

B. For incentive fees for contract performance years 2000, $52,835.00, plus any interest as provided by law; and

C. For incentive fees for contract performance year 2001, $53,614.00, plus any interest as provided by law.

John S. Buckley
Acting Clerk of Court

April 15, 2008

By: s/Lisa L. Reys
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

APPENDIX E

United States Court of Federal Claims

NORTH STAR ALASKA HOUSING CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant.

Nos. 98-168C, 02-1632C, 03-2699C.

Filed under seal: March 7, 2007.
Reissued: April 2, 2007.[1]

OPINION

ALLEGRA, Judge.

Just follow the Miami Hurricane's Game Plan. Blitz Fisher the first time he takes the handoff from Wartes. Force them to go for the short gains. Keep them out of the red zone. On offense, exercise good ball control and mix up the plays to throw off their timing. Try to draw them offsides and into a penalty

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[1] An unredacted version of this opinion was issued under seal on March 7, 2007. The parties were given an opportunity to propose redactions, but no such proposals were made. Accordingly, the opinion is issued in its original form, with minor corrections.

situation. And always remember that you have home field advantage.[2]

Despite what might appear, this is neither a case about football, nor even sports-at least, the athletic sort. Rather, it is a government contract case, before the court following trial in Fairbanks, Alaska, as well as trial and closing arguments in Washington, D.C. Armed with charged quotes like the above, plaintiff alleges, *inter alia,* that defendant's representatives acted in bad faith in administering the subject housing contract-driven by animus that led them to breach the contract repeatedly and to interpret other provisions in a fashion calculated to deny plaintiff the benefits of the bargain. So the question is-did defendant act in bad faith? And the answer, in light of the record, is-yes.

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[2] Thomas Beech Peterson, Chief of Housing, Department for Public Works, State of Alaska, United States Army.

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I. FINDINGS OF FACT

Based on the record, including the parties' stipulations, the court finds as follows:

A. Background

North Star Alaska Housing Corporation (North Star) is a Seattle, Washington-based corporation,

whose president and owner is Richard Fischer. After a competitive bidding process, North Star was awarded a contract to design and build a 400-unit housing project for soldiers and their families at Fort Wainwright, Alaska, in the southeast section of Fairbanks, Alaska. The award resulted in a long-term relationship between North Star and the Army Corps of Engineers (Army), the terms of which are outlined in a series of contracts between the two parties. Lease No. DACA: 85-1-86-11 requires North Star to lease property on Fort Wainwright for thirty-two years, through June 26, 2018. Lease Contract No. DACA: 85-9-86-27 requires North Star to lease the same property with residential buildings and other improvements back to the government. Lease No. DACA: 85-5-88-17, entered into on November 6, 1987, is the lease of the improved property from North Star to the Army for a term of nineteen years and six months, through May 5, 2007. Under this agreement (the Lease), the Army agreed to rent all 400 units in the development; it pays shelter rent for the use of the housing and maintenance rent for maintenance and operational services. The residential development resulting from this project is referred to as Birchwood Estates (Birchwood). *See generally, North Star Alaska Housing Corp. v. United States*, 30 Fed. Cl. 259, 265 (1993) (describing these events).

The last decade of the administration of the leaseback phase of Birchwood has been quarrelsome, to say the least. Prior to the initiation of this action, the parties agreed to settle a prior suit filed by North Star involving various claims arising out of the leaseback. Subsequent to that settlement, problems with the leaseback continued and North Star

disputed various actions taken by the Army's representatives in the administration of the contract. Ultimately, North Star filed claims with the contracting officer regarding a number of these matters. After some procedural machinations, various of these claims were incorporated into the First Amended Complaint filed in this case by North Star on August 23, 1999. Following settlement negotiations and an extended debate regarding whether a binding settlement had occurred, plaintiff filed a Second Amended Complaint in this case on April 16, 2002, which included essentially the same seven counts in the First Amended Complaint, but expanded somewhat on plaintiff's prior allegations of bad faith.

B. Critical Terms of the Lease

To determine whether plaintiff's contractual rights have been breached, the court first must determine what those rights are. *See San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed. Cl. 751, 759 (2003). At the outset, then, the court must outline the provisions in the Lease that underlie the disputes that will be discussed in greater detail below.

1. Basic Provisions

Article I of the Lease provides that the "Premises" includes "land situated on the Fort Wainwright Military Reservation ... together with the improvements constructed and provided thereon."

Article IV of the Lease specifies that "the Government shall pay to [North Star] an annual rental ... consist[ing] of a shelter rent and a maintenance rent" and that the "portion of the annual rental attributable to maintenance shall be increased or decreased at the commencement of each year." Article VIII of the Lease states that-

> [i]n addition to rents stipulated in Article IV of this Lease, the Government, at its option, may pay [North Star] an incentive fee not to exceed 5 percent (5%) of the maintenance rental for all housing units, for the period of time for which [North Star's] performance of the obligations and responsibilities contained herein are evaluated and found by the Government to substantially exceed the established standards. The amount of the incentive fee shall be determined by an Incentive Fee Board based upon the performance of [North Star] in operating the Premises in accordance with its obligation. Exhibit 'C' contains the provisions to establish the makeup of the Board and the procedures for determining such bonuses."[3]

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[3] Section II.4. of the maintenance annex provides that "[a]n incentive fee, for exceptional performance of standards contained in this annex, not to exceed 5 percent of the 'Maintenance Rental', will be determined on an annual basis by a board composed of three (Army) Officers or civilian personnel who will evaluate [North Star's] performance over the preceding twelve-month period. The board will make a determination within 60 days after the end of the period to grant all, some, or none of the incentive award fee."

Exhibit C to the Lease is the "Maintenance, Repair and Operational Services Standards Annex" (herein referred to as the "maintenance annex"), in which most of the details regarding how Birchwood is to be run are found.[4]

Various provisions in the Lease map the contours of the parties' responsibilities in regards to the property-these obligations flow to and from North Star, the Army, and the soldier occupants of the units. Regarding North Star's responsibilities in maintaining the property, section E of the maintenance annex declares that-

> [North Star] shall be responsible for maintaining all real property assets provided for in this lease agreement including dwelling units ... to a standard that prevents deterioration beyond that which results from normal wear and tear, and corrects deficiencies in a timely manner to assure full life expectancy of the facilities and equipment. The level of maintenance shall assure all structures are free of missing components or defects which would affect the

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[4] Section B.18. of the maintenance annex defines "Maintenance" as "[t]he recurring periodic or scheduled work required to preserve real property facilities, systems, moveable equipment, and accessories in such condition that they may be effectively utilized for their designated purpose." Article IV of the Lease provides that "[i]t is expressly understood and agreed to by [North Star] that the obligations of the Government to make any payments under this agreement and Lease [are] subject to the availability of appropriations for that purpose."

> safety, pleasing appearance or habitability of the units or would prevent any electrical, mechanical, plumbing or structural system from functioning in accordance with the design intent.... The quality of the work and the repaired areas shall be fully compatible with adjacent surfaces or equipment. All replacements shall match existing dimensions, material, quality of work, finish, color and design.... Wherever the term 'pleasing appearance' is used in this or subsequent paragraphs, it shall be construed to mean an appearance similar to the original finished appearance with only minor, nonobjectionable deterioration resulting from normal use. The housing unit shall be evaluated against the maintenance standards contained herein to determine deficiencies requiring corrections.

A series of other provisions in the maintenance annex requires North Star to maintain interior wall systems, linoleum and other tile floor coverings, carpeting, house accessories, outside recreational equipment, and painting.[5] Section G.1. of the maintenance annex obligates North Star to ensure

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[5] The Lease is particularly specific regarding painting, indicating in section E.8.(c) of the maintenance annex that-

> [p]aint ... shall be carefully applied with good clean brushes, approved rollers or by airless spraying.... Finish coats shall be smooth and free from runs, sags or other surface preparation defects. Each coat of paint shall be of sufficient thickness to cover completely the previous coat or surfaces.

that refuse is collected "twice weekly with three days between collections," while section G.3.(a) of the maintenance annex requires North Star to provide janitorial services.

Further, section E.8.(d) of the maintenance annex provides that "[c]omplete interior painting will be accomplished as required in conjunction with the change of occupancy work. Complete interior painting will be accomplished at the first change of occupancy occurring subsequent to the 3rd, 6th, 9th, 12th, 15th, and 18th years of the lease agreement." This provision additionally states that "[c]omplete or partial interior painting during all other changes of occupancy, except where required in connection with maintenance and repair, will be at the discretion of [North Star]."

Resident handbooks that were issued periodically during the years in question gave soldiers and their families instructions on how to clean their units. *Inter alia,* the 2000 version of this handbook instructed residents to "maintain [the] quarters as a prudent homeowner, and report any needed repairs;" "[t]o keep the premises clean and safe inside and outside;" "[t]o dispose of trash properly and in a timely manner;" "[t]o use all electrical, plumbing, sanitary, heating and appliances properly and in accordance with applicable manuals;" to maintain the appearance of yards, landscaping and playgrounds; and to exercise care in dealing with cigarettes, matches and lighters. The handbook emphasized that residents would be responsible for pet damage. An appendix to the handbook stressed that: (i) "[i]f the resident willfully or negligently destroys, defaces, damages, impairs, or removes any part of the

premises (including fixtures, facilities, and appliances) or willfully or negligently permits any person to do so, replacement or repair will be at the resident's expense;" and (ii) "[t]he residents will at their own expense ... replace or repair all broken or damaged glass, screens, flooring, wood plaster, drywall, and locks occurring during their occupancy, normal wear and tear excepted."

Other provisions in the Lease distinguish between permissible modifications to the units, ordinary wear and tear, and occupant-caused damage. Article VII of the Lease recites that "[t]he Government shall have the right ... to make alterations, attach fixtures, and erect additions, structures, or signs in or upon the Premises. However, no such changes shall be made to any improvement without the written consent of [North Star]." As to occupant damage, Section C.1.(s) of the maintenance annex specifies that-

> [d]amages to a housing unit or to other improvements within the project which are beyond normal wear and tear and are caused by the Government or an occupant, his dependents, or invited guests, which are not corrected by the Government or occupant, shall be repaired by [North Star]. The cost of such repairs shall be billed to the Government.... Repair of damages which occur to the units or other improvements that cannot be attributed to the Government, his agents, officers, occupants, their dependents, or invited guests, shall be accomplished by [North Star] at no cost to the Government.

Section D.7.(c) of the maintenance annex provides

that "[i]n the event the occupant fails to properly clean the unit for any reason, or correct damages beyond normal wear and tear for which the occupant is responsible, it shall become [North Star's] responsibility to satisfactorily clean and repair the unit for the next occupant." Section C.2.(c)(10) of the annex indicates that the government is required to notify North Star "via work authorization of occupant-caused damages or conditions requiring correction or cleaning and reimburs[e] [North Star] for accomplishment of same." Section C.3.(a) of the maintenance annex provides that "occupants shall be liable for loss or damage to the housing unit or equipment caused by the abuse or negligence of the assigned occupant, dependents, or guests."

To minimize debates regarding the cost of various repairs, Section C.1.(t) of the maintenance annex sets forth that-

> [North Star] shall, with the approval of the Government, establish a list of cleaning and repair costs for dwelling unit components which will establish the normal maximum amounts to be charged in the event of damage to property and equipment installed within a living unit over and above normal wear and tear. The list of repair costs will be based upon the latest published edition of applicable Engineered Performance Standards (EPS) Manuals (Army TB 420-series, Navy NAVFAC P-700 Series, Air Force AFM 85-series) which will be utilized to estimate manhour requirements.... The manhour requirements will be multiplied by the Department of Labor Service Contract Act

> Wage Determination rate plus materials at wholesale cost plus reasonable overhead and profit.... Such a list will be subject to change annually or from time to time by mutual agreement of [North Star] and the Government. Examples of items which might be included on this list are cleaning of stove, refrigerator, and entire dwelling unit, replacement of interior door, patching/repairing hole in interior door, patching/repairing hole in dry wall....

Under section C.2.(c)(11) of the maintenance annex, the Government is required to "[a]pprove [an] annual ... list of repair costs for occupant damages and printed occupant instructions as submitted by [North Star]." Further, section H.2. of the maintenance annex states that for those items of work for which North Star is entitled to reimbursement, "the Government shall issue a work authorization, in writing, authorizing the accomplishment of such work," indicating that North Star's "charges for this work will be based upon the approved list of repair costs." Likewise, sections H.3.(a) and (b) of the maintenance annex indicate that North Star is to submit invoices for services performed in response to the work authorizations, that the billing should be "in accordance with the approved List of Repair Costs," and that "[u]pon the Government's verification of work actually performed invoices will be processed for payment."

The Lease prescribes certain staffing requirements fore the site. The Army appoints a "housing project manager," who, under section B.15. of the maintenance annex, is "charged with the

responsibility for the day-to-day administration of the housing site and fulfillment of the Government's responsibilities under the terms of [the] lease agreement." Amplifying the responsibilities of this job, section C.2.(b) of the maintenance annex explains that the manager "shall serve as the primary point of contact for matters involving the day-to-day coordination and administration of the Government's responsibilities." Correspondingly, under section B.28. of the maintenance annex, North Star appoints a "site manager," who is its "[p]rimary point of contact authorized to act ... in all matters regarding work required at the housing site." Section C.1.(c)(2) of the maintenance annex provides that "[North Star] shall furnish sufficient personnel to perform all work specified within this annex."[6] In this regard, section C.1. of the maintenance annex provides that-"[North Star] is responsible for the ... maintenance, repair, replacement ... and all operations required to support the housing site. This includes ... housing units ... and all other components and systems of the total housing site insofar as such responsibilities are not normally undertaken by local governmental authorities." Section C.1.(j) of the maintenance annex provides that "[t]he quality and workmanship of maintenance, repair, replacement, and operational services shall be

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[6] Section D.1. of the maintenance annex provides that "[North Star] is responsible for managing the total work effort associated with the maintenance and other services required herein to assure fully adequate and timely completion of these services.... [North Star] is expected to assure an adequate staff of personnel, with the necessary management expertise, at the housing site continuously to assure the completion of the work in accordance with sound and efficient management practices."

first class in every respect and will be subject to the approval of the Government."[7]

The Lease also provides for performance monitoring and the resolution of disputes. Thus, section C.2.(c)(17) of the maintenance annex says that the government must "give [North Star] written notice of either noncompliance or unsatisfactory work on the part of [North Star]." Section D.3. of the maintenance annex states that-

> [North Star] shall meet with the Government periodically as called for by the Government. A mutual effort will be made to resolve all problems identified. The written minutes of these meetings, prepared by the Government, shall be signed by [North Star] and the Government. Should [North Star] not concur with the minutes, [North Star] will state, in writing, to the Government any areas of disagreement.

Further, section C.2.(c)(15) of the maintenance annex provides that the government is required to "[s]chedule, arrange, and conduct performance

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[7] Section C.1.(h) of the maintenance annex provides that "[a] facility history file for each housing unit ... identified by address shall be maintained by [North Star]. Each file shall contain a copy of all Government-issued work authorizations, preventative maintenance inspection reports[,] ... routine maintenance or repair, and renovation work orders in progress or completed. The Government shall require access to these files and they shall be available for periodic review by the Government. All documents shall be filed within 10 days of the completed transaction."

evaluation meetings with [North Star], and any other parties deemed necessary by the Government."

2. Change of Occupancy

The Lease contains a number of provisions governing changes of occupancy.[8] *Inter alia,* it provides a specific set of procedures for determining deficiencies in a particular unit, who is responsible for the costs for repairing those deficiencies, and how and when those deficiencies are to be remedied. Central to these mandates are a detailed set of inspection procedures.

Section D.7.(b) of the maintenance annex states that North Star "is responsible for conducting or participating in various types of inspections as described below," which inspections "shall be conducted in accordance with the technical standards and guidance provided here." In this regard, the Lease provides for a pre-termination inspection, a termination inspection and an acceptance inspection. Section C.2.(c)(7) of the annex makes the government responsible for scheduling and coordinating these inspections, while section C.2.(c)(8) of the annex requires the government to advise North Star "of proposed occupancy changes and date of pretermination and termination." In this regard, section D.7.(b)(1) of the maintenance annex adds:

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[8] Section B.7. of the maintenance annex defines "Change of Occupancy" as "[t]he termination of assignment by the Government of [an] occupant to a unit or the assignment of [an] occupant by the Government to a unit and the associated downtime occurring between these two events."

> The Government will schedule a pre-termination and termination inspection after being advised by the occupant of an impending move. These inspections will be scheduled during normal working hours. The Government will, in writing, notify [North Star] of the date, time, and address of each inspection. The Government will make every effort to provide this notice 21 days in advance of the projected change of occupancy. Because of short-time occupant orders or other extenuating circumstance, [North Star] can expect an average of 10-14 days advance notice. [North Star], or [its] representative, is required to attend the pre-termination inspection.

As to pre-termination inspections, section D.7.(b)(2) of the maintenance annex indicates that-

> During the pre-termination inspection, [North Star] shall identify and prepare work orders covering all painting, maintenance, and repair work required of [North Star]. The Government shall jointly identify, with the occupant, all damage to property and installed equipment which is over and above normal wear and tear and which is the occupant's responsibility to correct. The Government will provide the occupant with a list of this work and associated costs for which the occupant is liable, as contained on the approved list of repair costs, and provide a copy to [North Star]. At the conclusion of this inspection, the Government shall notify, in writing, [North Star] of the firm date and

> time for the final inspection and the date and time that the unit will be turned over to [North Star] for accomplishment of change of occupancy work. [North Star], in turn, shall immediately provide the Government with a firm written commitment as to the date and time that the unit will be turned back over to the Government for assignment to the next occupant.

These pre-termination inspections are designed, in part, to allow North Star to prepare for the work that it will perform during the downtime following the change in occupancy.

Regarding the termination inspection, section D.7.(b)(3) of the maintenance annex states that "[t]he Government will conduct the termination inspection jointly with the occupant after the furnishings have been removed." It further indicates that North Star's "representation at the termination inspection is at [its] discretion." The termination inspection is performed after the occupant has been afforded an opportunity to remedy certain of the deficiencies identified at the pre-termination inspection. It also allows the parties to adjust, as necessary, the schedule for the Army to turn a unit over to North Star and for North Star to return the unit for a new tenant. In this regard, section D.7.(b)(3) of the Lease explains-

> Should the date and time that the unit will be turned over to [North Star] change for any reason, the Government shall immediately notify [North Star] in writing of the revised date and time. [North Star] will then immediately notify the Government, in

> writing, of the revised date and time that the unit will be turned over to the Government for assignment. Subsequent to the termination inspection, the Government will issue to the [North Star] a work authorization for the repair of damages, or accomplishment of cleaning, which are the responsibility of the occupant but were not completed at the time of the termination inspection.

Section D.7.(a) of the maintenance annex indicates that "[w]ork identified by [North Star] or [the] Government during the pre-termination and final termination inspections which is required to make a unit ready for the next occupant, shall be accomplished while the unit is vacant." It states that "[t]his work includes any routine maintenance and repair, as well as interior painting." Section C.1.(p) of the maintenance annex requires that after North Star performs the necessary repairs and replacements and, "[p]rior to acceptance of a unit by the Government," North Star "shall clean the entire unit" and "shall insure units meet the same standard of cleanliness the Government requires of terminating occupants." This work includes "removal of all stains, fingerprints, and paint spots, cleaning of all dust and dirt, washing of windows, cleaning of all appliances, cleaning of all ceramic tile, and washing of floors."

Section D.7.(d) of the maintenance annex reads that "[u]pon completion of all change of occupancy work, [North Star] will notify the Government of work completion and unit availability," at which point the Army conducts the third of the change of occupancy inspections, the "acceptance inspection."

Section B.2. of the maintenance annex defines the "Acceptance Inspection" as "[t]he inspection of a vacant unit between changes of occupancy or subsequent to completion of renovation work to ensure that all work has been completed satisfactorily and that the unit is in a presentable condition for viewing and acceptance by a prospective occupant." Providing further information about these inspections, section C.2.(a) of the maintenance annex declares-

> [a]cceptance inspections of all dwelling units will be conducted ... after completion of repair or rehabilitation work on the unit. The Government shall conduct these inspections jointly with [North Star]. The Government will schedule these inspections to occur on the same date that the work is completed if notification of work completion is received before 12:00 noon, or before 12:00 noon of the next workday, if such notification is received after 12:00 noon, at a time that is mutually agreeable. The Government has the right to refuse to accept the unit if the work has not been completed or performed satisfactorily or is otherwise not in accordance with the provisions of this annex. The Government shall, immediately upon conclusion of the acceptance inspection, notify [North Star] in writing of acceptance or refusal. If the unit is refused, the Government shall also notify [North Star], in writing, of all discrepancies requiring correction.

Section H.1.(c) of the maintenance annex provides that "[i]n the event [North Star] fails to complete

change of occupancy maintenance work by the date identified by [North Star] as when the unit would be returned to the Government ... the Government shall assess liquidated damages based on the most current average daily rate of BAQ [basic allowance for quarters] plus VHA [variable housing allowance] plus average daily lease cost per unit for each calendar day subsequent to that date."

3. Downtime

Many of North Star's claims here involve "downtime," defined by Section D.5. of the maintenance annex as "the period during which a housing unit is vacant for reasons of change of occupancy, maintenance work, major repair or unhabitability, or restoration of units damaged by fires or acts of God." That section emphasizes that "[North Star] shall ensure that downtime while a unit has been turned over to [it] does not exceed the allowable time prescribed [in sections D.5.(a) and (b) of the maintenance annex]." It further stresses that "[d]owntime must be minimized in order to maximize occupancy of these units." Section B.10. of the maintenance annex similarly defines "Downtime" as "[t]he period of time during which a unit is vacant and has been officially turned over to [North Star] for accomplishment of required work," and adds that "[f]or purposes of this lease agreement, downtime is measured in working days, vice calendar days."

The Lease contains a detailed description of how downtime is to be calculated. Section D.5.(a) of the maintenance annex, entitled "Change of Occupancy Downtime," provides that "[t]he total number of

downtime days for units vacant for purposes of change of occupancy maintenance shall not exceed the number of moveouts (excluding moveouts for purposes of scheduled repairs or fires and acts of God) per month multiplied by 3 days." It indicates further that "if [in] any 5-day work period, more than eight units are turned over to [North Star], two additional days will be allowed for each unit in excess of eight."[9] Likewise, section D.5.(b) of the maintenance annex, entitled "Scheduled Repair or Renovation Downtime," provides that-

> [d]owntime for reasons of scheduled repair or renovation will be completed on the basis of the actual number of days any specific unit has been turned over to [North Star] for such

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[9] As to the "3-day" rule, the Lease gives the following example: "For example, if there are 10 move-outs in 1 month, the total allowable downtime for that month is 30 days." As to the "5-day" rule, the Lease gives the following example-

> For example, if there are 17 move-outs in a month, the total allowable downtime is 51 days. However, if 11 of these units were turned over to [North Star] within a 5-day work period, an additional 6 days will be allowed for a total of 57 days in allowable downtime (representing the additional 2 days for each of the units in excess of eight turned over within a 5-day work period added to the 51 days allowed for 17 move-outs).

Despite Lease provisions suggesting that downtime is to be measured on an average monthly basis, section D.7.(d)(1) of the maintenance annex states that "[a]ll change of occupancy work must be completed within three working days after the unit becomes available, which shall be determined from the date the unit is turned over to [North Star] by the Government for change of occupancy work."

> work. The downtime period will begin with the date the Government turns the unit over, in writing, to [North Star] for this purpose and will end when the Government accepts, in writing, the unit from [North Star] subsequent to work completion. Section D.7.(d)(2) of the maintenance annex provides that "[t]he downtime period will be determined as follows: If the unit becomes available prior to 12:00 noon, the period will begin at 1:00 p.m. that day. If the unit becomes available at 12:00 noon or later, the maintenance period will begin at the start of the following work day."

The Lease provides for penalties should North Star fail to comply with the downtime provisions. Section D.5.(b) of the maintenance annex indicates that "[d]eductions for [North Star's] failure to adhere to the scheduled downtime will be in accordance with clause H.1. [of the maintenance annex]." Section H. 1.(d) of the annex provides that "[i]f the downtime in any one month for units vacant for purposes of change of occupancy work exceeds the allowable downtime for that month (established in accordance with clause D.5.(a) [of the maintenance annex]), the Government shall assess liquidated damages based on the most current average daily rate of BAQ plus VHA plus average daily lease cost for each calendar day in excess of the allowable downtime."

C. The Dispute: A Chronology

The findings in this segment are described chronologically, rather than by the subject dispute

(*e.g.*, downtime or incentive fees), because the record demonstrates that conflicts involving the Lease fed on each other, with new disputes springing up periodically to further complicate matters. Understanding this synergy is key to a proper understanding and analysis of plaintiff's bad faith claims.

1. 1989 through 1995

During the first several years after the contract was awarded, disputes began to arise, among them concern over the phase-in of the project itself, refuse collection, the timing of various rent payments, and whether defendant was required to have an on-site manager. However, these issues were addressed under the dispute resolution mechanism provided by the contract; the parties otherwise enjoyed a positive working relationship. Indicative of this is the fact that, as illustrated in the following chart, from 1987 through 1992, North Star received various incentive fee awards, often accompanied by glowing transmittal letters that lauded its efforts:[10]

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[10] For example, the Army's January 4, 1989, letter announcing the fee award for 1988 indicated that North Star had "demonstrated exceptional response to the soldiers and their families" and had "done very high quality work." Likewise, a 1991 letter from the Army awarding North Star an incentive fee, thanked North Star for "the high standards of work accomplishment, excellent customer service and very professional project management," and commented, "[t]he incentive fee award is well deserved by your staff and is government money well spent." Indeed, a January 1993, letter notified North Star that the Birchwood project had been

1987 (interim period)	$13,236.09
1988	$42,921.00
1989	$56,113.93
1990	$50,295.78
1991	$52,398.78
1992	$53,326.19

In 1993, when several issues were not resolved to its satisfaction by contracting officer decisions, North Star filed a lawsuit in this court. On December 22, 1993, this court granted, in part, and denied, in part, the parties' cross-motions for summary judgment. Despite this litigation, North Star continued to receive essentially the maximum incentive fees allowed-$54,041.30 for 1993 confirmed by a decision issued on February 2, 1994, and $55,225.00 for 1994 confirmed by a decision issued on January 11, 1995.

In September of 1995, the lawsuit was settled. In the settlement agreement, North Star offered "to assume full responsibility for refuse collection and disposal," for which the United States agreed to provide North Star $1,000 per month. However, a disagreement eventually arose over what this provision entailed. On November 22, 1995, the Fort Wainwright Director of Public Works informed the

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highlighted at a recent hearing of the Senate Defense Appropriations Subcommittee, where it was "described in a U.S. Army, Pacific, fact sheet as an extremely successful project and a prototype for future Army housing initiatives."

Commander, U.S. Army Engineer District Alaska that "[t]he Army standard for adequate housing is weekly curbside trash pick-up." On December 1, 1995, the contracting officer pointed North Star to the Lease provision requiring that North Star "insure that refuse is collected twice weekly" and directed North Star to provide the same type of refuse collection and disposal as required by the Lease.

During this same year, disputes began to arise concerning the calculation of downtime and changes of occupancy. But, again, these disputes appear to have been handled amicably, with Suzanne M. Harrison, the Chief of the Housing Division at Fort Wainwright, indicating in an August 17, 1995, memorandum that "[a]s always, North Star was very cooperative in assisting Housing in gaining maximum utilization of these 400 units." Others, however, had different ideas. An October 27, 1995, memorandum that was coordinated by Thomas B. Peterson, the Chief of Housing for the Army's Department for Public Works in Alaska, instructed, as to the Lease's downtime provisions, that North Star's "failure to meet timeframes so computed should result in the enforcement of penalties." Several weeks later, on November 22, 1995, Karen Goodrich, then the Chief of Housing at Fort Wainwright, alerted Mr. Peterson that a dispute continued as to what the 1995 settlement required in terms of trash removal.[11]

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[11] Although at other points in the record it appears that the debate involved both the periodicity of the pick ups and whether they would be curbside, Ms. Goodrich, in her memorandum, apparently focused only on the former issue, as she stated that "[a]n out of court settlement was reached to allow the contractor to decrease pick-up from twice a week to once a week."

That same day, Mr. Peterson wrote the Commander of the U.S. Army Engineer District for Alaska, stating that North Star has "unilaterally eliminated trash collection services." While admitting that "weekly curbside trash pick-up" was the Army standard, Mr. Peterson indicated that North Star's failure to pick up trash represented an "unanticipated, unfortunate and totally unsatisfactory elimination of services [that] needs to be resolved immediately."[12] He requested "intervention to correct this blatant abrogation of support responsibility for 801 Birchwood residents." On November 29, 1995, the day that North Star apparently was to announce its trash removal policies to the tenants, Mr. Peterson sent a facsimile to two North Star officials in which he warned that "I suggest that you defer tonight's discussion of this issue or Post Commander Reps will be forced to tell tenants to disregard your letter of instruction," adding that "[t]his divisiveness will cause us other problems and open a pandoras [sic] box." The record suggests that, notwithstanding this facsimile, North Star communicated with the tenants regarding trash removal.

Subsequent efforts to resolve this dispute over refuse collection proved unsuccessful. On December 29, 1995, Mr. Peterson wrote North Star suggesting, apparently for the first time, that the issue

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[12] While, in his memorandum, Mr. Peterson appears to suggest that North Star had ceased all trash pick up, other parts of the record suggest that the dispute involved whether such service would be provided once or twice a week.

concerning refuse collection could impact North Star's ability to receive an incentive fee.[13]

2. 1996 and 1997

On January 10, 1996, the Army wrote North Star indicating that "the unilateral notification of residents by North Star of your intention to eliminate required trash collection services" and "the failure to provide the level of trash collection services to which you agreed in the Sep 95 settlement" had caused North Star's performance to be rated "less than exceptional" in November and December of 1995, a rating that, in turn, caused the Army to reduce the incentive fee. North Star unsuccessfully appealed this decision to the Army's Director of Public Works at Fort Richardson, Alaska.

In the spring of 1996, a dispute began to develop regarding change of occupancy turnaround time. Prior to this time, North Star had consistently repaired vacant units and turned them back to the Army in less than the time specified by the Lease. At a meeting held on July 10, 1996, Mr. Peterson complained that North Star was falling behind in turning units back on a timely basis. At the meeting, he indicated the Army's intent to begin turning over units to North Star for repair in blocks-8 units to be released each Monday. In the minutes of this

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[13] In an undated letter that appears to have been issued prior to December 29, 1995, Mr. Peterson indicated that another disagreement over the interpretation of the Lease would "not impact or affect the performance standards used to establish the annual incentive award."

meeting, Mr. Peterson is reported to have stated that the latter process was designed to ensure that the Army would not be "penalized" by requiring it to provide North Star with additional down time, indicating that his goal was "to issue them in a sequence that keeps it to an average of three days."[14] In a August 12, 1996, memorandum to Col. Albert J. Kraus, the Commander of the Alaska District, Mr. Peterson recapped the meeting, highlighting the turnover problem while emphasizing that "[t]he change of occupancy turnaround time is a significant factor in determining overall performance award." In August of 1996, Col. Kraus was replaced by Col. Wm. David Brown.

The incentive fee award meeting for 1996 occurred on January 8, 1997. Following the meeting, Mr. Peterson sent an e-mail to Mr. Edward Miller, then the Army's Birchwood manager, chastising him for being unprepared. At that meeting, Mr. Miller had made assertions regarding North Star's performance for which he lacked documentation. Criticizing this, Mr. Peterson indicated, in his e-mail, that "I don't think we want to emphasize to Fischer that after all your time on site, you are just now starting to keep a formal record of your inspections, that will just embarrass us all." At the meeting, North Star apparently also argued that, under the Lease, it was entitled to additional days for approved work authorizations. In an undated letter, Col. Brown

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[14] Recall, that, in terms of downtime, section D.5. (a) of the maintenance annex states, "if [in] any 5-day work period, more than eight units are turned over to [North Star], two additional days will be allowed for each unit in excess of eight."

subsequently rejected that interpretation. On February 10, 1997, Col. Brown, in an internal memorandum, proposed that the Army's rent payment for 1996 be reduced by $41,256.57 "based on excessive change of occupancy down time."[15] On April 16, 1997, Col. Brown wrote North Star announcing an incentive fee award for 1996 of $39,000, indicating that "[t]he only rated areas which were significantly less than exceptional were between occupancy vacancy rates." Nonetheless, the letter indicated that actual payment of the fee might be delayed because of "the ongoing attempts to collect overdue accounts receivable from North Star." On May 22, 1997, Mr. Fischer indicated that he was unaware of any overdue accounts and asserted that North Star was not being treated "even handedly." Col. Brown disagreed with the latter characterization in a letter dated June 6, 1997, yet also indicated that "future awards will probably be made 'subject to the availability of funding.' "

The refuse collection and downtime issues continued to fester. On June 10, 1997, Mr. Dennis Klein, the Chief of the Army's Real Estate Division in Alaska and the Contracting Officer for the Lease, wrote Mr. Fischer indicating that he had been

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[15] On April 9, 1997, an evaluation meeting was conducted at which Mr. Fischer complained regarding the Army's practice of holding units after they had been received from the cleaners and releasing them in a group, implying that this practice was contributing to downtime delays. Mr. Peterson and Ms. Goodrich essentially responded that they had adopted the practice to ensure that the Army did not release more than 8 units in a five-day period so as inadvertently to afford North Star additional downtime under the Lease.

notified by Mr. Peterson that "recent changes in refuse collection and disposal in the Birchwood housing complex [have] resulted in service that is below the level required by the subject lease." Mr. Klein warned that the failure to commence twice weekly collection on or before June 23, 1997, could result in the imposition of penalties. On June 11, 1997, Mr. Fischer responded, taking exception to the imposition of penalties and indicating that North Star had repeatedly requested a contracting officer's decision on the refuse point, but had not received that decision. On June 13, 1997, Mr. Klein wrote, confirming his receipt of the June 11, 1997, letter. On June 20, 1997, Mr. Fischer sent a second letter to Mr. Klein, stating-

> It is quite obvious to us that your action on this matter was punitive. The post commander at Fort Wainwright has not regarded once a week pick up as a problem [and] in fact was not informed of your action prior to our recent contact with him. The first that his office knew of the change you demanded was our call to him to inquire as to what days he would suggest the garbage be picked up.

Mr. Fischer concluded-"We consider the above actions to be in bad faith in your dealings with us."

On July 9, 1997, North Star and the Army conducted a maintenance evaluation and incentive meeting for the months of April through June of 1997. At that meeting, Mr. Miller offered the results of his evaluations, to which North Star raised numerous exceptions. In a memorandum dated July 9, 1997, the Army unilaterally adopted a depreciation

schedule for all carpeting, thereby reducing the reimbursement amount that North Star would receive for replacing carpeting with occupant damage. This memorandum, issued by Ms. Mae Harrell, then the Army's housing manager at Birchwood, stated-

> 1. Effective immediately, all charges for damages to carpet will be figured using a ten (10) year life expectancy in ALL housing areas.
>
> 2. If the carpet is determined to be ten (10) years old, it will be replaced as fair wear and tear and not [sic] charge will be brought against the occupant. If the damage is due to pet odor, the occupant will be charged for sealing the floor and any other measures required to abate the pet odor.
>
> 3. When determining the depreciation on damaged carpet, subtract 10% of the total value for each year that the carpet has been installed. This does not include the labor for installing the carpet only the materials.

On July 11. 1997, Mr. Fischer sent the Army a letter addressing Mr. Miller's ratings on a point-by-point basis. On August 1, 1997, Col. Brown responded, agreeing that Mr. Miller's evaluation was "incomplete and unsatisfactory in so far as presenting a clear objective record." This letter indicated that the evaluations were being reconsidered, but, nonetheless, asserted that North Star should replace carpeting that is "in worn and poor condition" which had "outlived its useful economic life." Thereafter, it appears that Col. Brown sent North Star a letter

providing a more detailed response to North Star's dissatisfaction with the specific evaluation comments made previously by Mr. Miller. This letter asserts that North Star had initiated a legal action against Mr. Miller and indicates that the lawsuit "will not help to improve on site working relationships" and may generate "some negative feelings on both sides for the foreseeable future." In the letter, Col. Brown increased North Star's ratings on several, but not all, of the factors on which North Star had appealed.

On August 7, 1997, Mr. Fischer wrote Mr. Klein indicating that North Star would not begin to collect refuse twice weekly until "a clear demand" to that effect was made. This letter indicated that the "refuse collection has been the subject of a request that you issue a contracting officer's decision since May 22, 1996." On August 13, 1997, Mr. Klein requested North Star to commence twice-weekly collection of garbage, trash and bulk items beginning August 18, 1997. On September 5, 1997, Mr. Peterson e-mailed Ms. Goodrich criticizing Mr. Miller's performance and indicating, with respect to the evaluation meetings-"I guess my point is, it isn't business as usual anymore, we need to relook and prepare better than ever." On September 25, 1997, Mr. Robert A Welch, then Chief of the Army's Acquisition Branch, Real Estate Division, in Anchorage, requested North Star to provide formal notice to the tenants of the twice-weekly refuse collection. North Star, however, refused to do so, operating apparently on the view that it had been instructed otherwise by Mr. Klein.

At a quarterly evaluation meeting held on October 15, 1997, the parties disputed the Army's use of

depreciation for carpeting. A transcript indicates that the following exchange between Mr. Fischer and Col. Brown transpired:

> BROWN: Okay, so if there's pet damage on a nine year old carpet, then your position is the government is responsible for paying the whole amount, basically?
>
> FISCHER: Absolutely or any other damage for that matter. Any time the government damages anything they're responsible, I would think.
>
> BROWN: Even considering the fact that that-I don't know what the industry standard is. I don't know what it is. It may be five years. It may be fifteen years, but-
>
> FISCHER: It's also not relevant.
>
> BROWN: Well, it is relevant, Dick, because I'm going to make it relevant.
>
> FISCHER: Okay, you go ahead and make it relevant.
>
> BROWN: And whether you want to accept it or not. You know, common sense tells you if that carpet has been and whatever the industry standard is-I don't know what it is, but we're going to determine what it is and you are either going to come up with a depreciated schedule or we're going to come up with one and I'm going to investigate the possibility of-I mean you think about it from a common sense point of view. If that carpet has a-let's say for example, and I'm not saying that's it, but let's say for example, its got a ten year life

cycle on it and let's say it's at 90 percent, say we have dog damage to it, okay. It has been 90 percent used of its useful life at that point, you should be replacing it year number 10 anyhow. So the government's responsibility from a common sense point of view is we should be responsible for the remaining life of that carpet, because you have benefited from the first nine years of that carpet and we should be responsible for the remainder of it if a dog tears it up. If you had the carpet in there for one year and we have to replace it, then we shouldn't be responsible for the nine years of remaining life. It has been in there-if the useful life is ten years and a dog tears it up and the useful life is ten years, we shouldn't have to be responsible for any of it. So, it's all going to depend on what that is that if you don't want to deal with us on this, then what I'm going to do is I'm going to get with the lawyers and we're going to come up a depreciated schedule and then I will-we will figure out some way to deduct that from your payments and then if you want to sue us, have at it, but you know what is fair here and you need to work with us on this and we'll work with you on it, but if you don't, I'm going to do exactly what I said I'm going to do and let the chips fall where they will, cause you know that's the right thing. You know that.

FISCHER: Absolutely not. I totally disagree with you.

BROWN: Okay fine, let's move on, move on to the next one.

GOODRICH: I think Billie was finishing up her portion of the-

FISCHER: So-

BROWN: I told you right up front what I'm going to do about it and if you want to talk about it, we will.

FISCHER: I'd be happy to talk about it, you just cut me off, so.

BROWN: Well, you told me you totally disagree so we'll just move on.

FISCHER: I do disagree totally and I have good reason for it and I'd be real pleased to go into it, if you wish.

BROWN: Okay, go ahead.

FISCHER: Okay. We have cooperated and we will continue to cooperate and any time a carpet is not serviceable we're going to replace it. That's what we're doing and that's what we'll continue to do. If that carpet is damaged, we have no way of determining whether that carpet-when that carpet will not be serviceable. Depending upon the care of the unit, it could be that the carpet is serviceable for 20 years. We don't know.

BROWN: Well, there's industry standards for that and we can determine that.

FISCHER: Well that's not per our contract. Industry standards are not part of our contract.

BROWN: Well, that's fine, you know-

FISCHER: It says when the carpet is no longer serviceable.

BROWN: If that's your position, that's your position and we'll go from there.

FISCHER: Well, Colonel, that seems to be the way you care to settle all these things.

BROWN: No, I just can't seem to get any-any, you know, common sense, you're a business man and if the shoe was on the other foot, you would say exactly what we're saying out here. You know and-

FISCHER: We have a responsibility to keep these units in impeccable condition and that's what we're doing and we're not going to be responsible whether some tenant damages something in these units.

BROWN: No, and you should not be.

FISCHER: That's right.

BROWN: You should not be.

FISCHER: And that's our position.

BROWN: And neither should the government be totally responsible for 10 year old carpet in total when a dog damages it and you know that.

FISCHER: If the life of the-

BROWN: Okay, let's move on. I don't even care to talk to you any more about this issue. You're very unreasonable on this and I knew you were going to be-so let's just move on to another issue. We'll just let your lawyers and

> our lawyers deal with this, because I'm going to figure out a way that I can take it right out of your pay.

Later, at this same meeting, Col. Brown ordered that future evaluation meetings not be recorded.

In the late summer or early fall of 1997, the Army hired a contractor to conduct a survey of the Birchwood residents, with a view toward using the survey results in making incentive fee determinations. On November 14, 1997, Mr. Fischer wrote Col. Brown emphasizing that, contrary to the latter's assertion, "[t]here is no lawsuit pending against Mr. Miller" and complaining about Col. Brown's decision to move the evaluation meetings to Fort Richardson, Alaska. Regarding the increasing tensions between the parties, Mr. Fischer asserted-

> Our contract provides a clear forum for contractual resolution of differences of opinions. We would expect to follow these procedures. Differences of opinion on contractual matters which we have had in the past have not affected the Army's assessment of North Star's performance. This was the case until your decision to demerit North Star for the difference in the manner that the turnaround time has been interpreted this past year.

Mr. Fischer again asserted that the Army was dealing with North Star in "bad faith" and indicated that he would not be dealing with further correspondence on this matter because "[i]t is clear to me and I dare say to everyone present at the last quarterly meeting that you have a personal problem

with me." On November 25, 1997, North Star requested a contracting officer's decision with respect to both the turnaround time and refuse collection issues.

On December 9, 1997, Mr. Peterson prepared a memorandum for the DPW staff in which he asserted that issues involving downtime and carpet depreciation should impact the decision whether to grant North Star an incentive fee for 1997. In this regard, he argued-

> From an ethical perspective, I think the board would be acting in contravention of the government's interests if it were to approve a substantial cash award during a period when the contractor's failure to apply sound and efficient management practices (*i.e.*, failure to pro rate the cost of carpet IAW industry standards) has become a substantive cost issue....
>
> I don't think that the Board can ethically ignore North Star's failure to fairly apportion the carpeting cost. An approval of an incentive award which could be construed by the contractor as either ignoring or encouraging continued actions by North Star which result in double payment for carpeting maintenance costs would be a derelection [sic] of the Board's explicit and implicit duties in representing the best interests of the U.S. Government.

Accordingly, it appears that, at least by this time, the fact that North Star was raising various claims with the contracting officer was viewed by Mr. Peterson as

a reason to deny it an incentive fee. On December 11, 1997, the Army's District Engineer wrote North Star indicating that the contracting officer decisions on the issue of twice-weekly refuse collection and down time would be issued within 45 days of North Star's November 25, 1997, request.

On December 12, 1997, Mr. Peterson e-mailed Col. Brown and Ms. Goodrich, reiterating that it would be "unethical to pay an incentive award to North Star for a time period during which they have ... blatantly refused to discuss equitably apportioning costs" for carpet. Mr. Peterson indicated that "[a]s a member of the Board, I feel that we are bound by formal principles of ethical conduct to select the 'no incentive award' option until the government's maintenance concerns are addressed/resolved." In an e-mail December 22, 1997, Mr. Peterson further asserted that North Star's position with respect to carpet replacement was not in "good faith."

3. 1998

On January 28, 1998, Mr. Klein sent Col. Brown a copy of his decision on the downtime issue. This decision concluded-

> I find and conclude that the contract allows for a maximum occupancy downtime per unit of three days for completion after turnover by the Government to [North Star], if eight or less units are turned over within any given 5-day work period. I find that if more than eight units are turned over within any 5-day work period, then the allowable occupancy downtime is increased to five days per unit

> for units in excess of eight. I further find and conclude that the maximum allowable aggregate occupancy downtime in any given month cannot be interpreted to permit occupancy downtime maintenance on the units to run consecutively.

This decision was mailed to North Star on January 29, 1998. That same day, Col. Brown sent North Star a letter in which he announced an incentive fee award of only $21,272, less than half of the prior awards. On March 9, 1998, North Star filed a complaint in this court, primarily to address the depreciation issue. The contracting officer's decision on the carpet depreciation issue was mailed to North Star on March 26, 1998. This decision by Mr. Klein concluded-

> I find and conclude that when it is determined, based upon inspection, that because of normal wear and tear, carpet no longer has a pleasing appearance as defined in the contract, then it is the responsibility of [North Star] to replace such carpet. I find and conclude that the contract requires that the expected useful life of carpet be established by reasonable proof. I find that where carpet is replaced due to pet or other occupant damage beyond normal wear and tear, the replacement cost paid by the Government is required to be depreciated based on the age of the carpet in relation to its expected useful life and reasonable replacement schedule.

These contracting officer decisions resolved little in terms of the parties' disputes over particular units. Indeed, new issues incessantly arose.

One of these issues involved what North Star referred to as "stockpiling"-the Army's practice of holding units that had been vacated by service members for days, sometimes weeks, and occasionally months, and then releasing them to North Star, for maintenance and repairs, in batches. Various Army officials contended that this process was designed to prevent the Army from inadvertently releasing more than eight units to North Star within a 5-day work period, so as to trigger the extended 5-day downtime period.[16] North Star, however, complained bitterly that stockpiling made it difficult for it to perform the necessary repairs within the allotted time, complicating, in particular, the scheduling of subcontractors for tasks such as carpet and vinyl replacement.[17] In a June 3, 1998, memorandum,

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[16] At trial, Mr. Harold Hopson, who eventually become the contracting officer on the Lease, admitted that stockpiling requires North Star to have more staffing and makes it more difficult for North Star to meet the downtime requirement. He further testified that he mistakenly thought the Army was releasing the units as they were cleaned. Mr. Rodney Everett, who was the Contracting Officer Representative at Birchwood, testified that stockpiling made North Star's task "very difficult" and that he would not have administered the Lease in this fashion.

[17] In his testimony, Mr. Eldon Wartes, who would eventually become North Star's site manager at Birchwood, explained-

> Q: What was the impact of that behavior on your work when you started in 1998?
>
> A: It's huge. These units all issued at the same time.... There's no way I can schedule subcontractors to be in these units all at the same time. It's just a scheduling nightmare.

North Star's site manager complained to Ms. Goodrich that this practice was "another effort by the Army to make it as difficult as possible for North Star to perform its contract," asserting further that North Star "regards this action to be another exercise of bad faith on the part of the Army in dealing with North Star."

These complaints, however, fell on deaf ears as Mr. Peterson instead was focused on reducing North Star's rent for what he perceived as excess downtime and, if possible, contracting out the repair and maintenance functions to a third party. In a July 8, 1998, e-mail to Mr. Klein, Col. Brown and Ms. Goodrich, he wrote that "[a]lthough we now have the benefit of several favorable CODs, we still seem to be floundering as to the best course of action for deducting rent, withdrawing work for accomplishment by an alternate source, etc." On July 13, 1998, Mr. Peterson wrote Mr. Klein urging that rental deductions be made against North Star and stating "[w]e expect your support to finalize this action this week and so inform NorthStar." The next day, July 14, 1998, Mr. Klein responded-

> It is important that we focus on providing the soldier with the best service and housing available. I perceive that as your role as a housing manager. We will work with you to accomplish that goal. Please refrain from directing the Contracting Officer. A number

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Mr. Wartes further testified that stockpiling has strained his relationship with various local subcontractors, particularly when schedules were changed by the Army at the last moment.

> of the contractual issues you frequently address are under consideration in the Federal Court of Claims and are subject to review and determination by the attorney's handling this case.

Mr. Klein added that a contracting officer representative would attend the next evaluation meeting, "but will not be able to make commitments relating to assessment of damages or reductions of rent." Rejecting this position, Mr. Peterson, in an internal memorandum, dated July 20, 1998, complained that Mr. Klein had raised "disturbing issues" regarding the "quality of the coordination and support which we feel that we are entitled to receive." He indicated that his office "needs a strong, aggressive proponent" and "may not find it" in Mr. Klein's office. This memorandum also recommended that a "[f]ormal strategy for access to Birchwood" be developed for when the Lease expired in 2007, suggesting that Mr. Peterson was already focusing on replacing North Star nearly a decade before that opportunity would first arise. On July 20, 1998, Mr. Peterson formerly responded to Mr. Klein's e-mail of July 14, stating, *inter alia,* that "[y]our first paragraph [quoted above] seems to be giving us poor legal advice," and that, instead, there should be a "bias toward action." On July 22, 1998, Mr. Klein responded, stating that "I am totally confused at your memo," indicating further that "[t]here appears to be a lot of jumping to conclusions and emotional overtones."

In the fall of 1998, the Army again surveyed the Birchwood residents. The survey contained several questions that appeared to ask residents their views

regarding the ongoing contractual disputes between the parties. For example, one question stated, "[i]n their original proposal, [North Star] proposed the replacement of carpet in each unit at approximately seven year intervals," and asked the tenants essentially how often they would like to have their carpet replaced. Another question stated that North Star "advised the government, in June 1998, that they had experienced an almost complete turnover of employees," and asked the residents "[d]id you, as a tenant, experience any decline in service which you felt was attributed to this high employee turnover." The survey also had one or more questions that implied that North Star was responsible for certain reductions in service that, in fact, had been prompted by the Army (*e.g.*, the elimination of a location where residents could obtain household supplies). Another question asked tenants whether they had "pleasant" or "unpleasant" living experiences without identifying maintenance issues that were the Army's responsibility, potentially leaving the false impression that all the deficiencies at Birchwood were North Star's fault.

On December 30, 1998, Mr. Peterson prepared a "discussion" paper in which he advocated that North Star not receive an incentive fee for 1998. In so arguing, he relied heavily upon several factors: (i) that there continued to be disputes regarding carpet replacement; (ii) that an audit was pending regarding the contractor's alleged failure to meet agreed upon standards; (iii) the results of annual resident survey,

which he refers to as a "primary evaluation tool;"[18] and (iv) that funding for the Army's overall resident program had been reduced and that any incentive fee not paid to North Star could be used to "mitigate reductions in maintenance/ repair programs." This memorandum concluded "[b]ased upon the facts as above, particularly FY 99 ... funding posture in USARK [the U.S. Army in Alaska], the Board (Mr. Peterson and Ms. Goodrich) place a low overall priority on the approval of any incentive award for 1998 and recommend that 'none' be approved at this time."

4. 1999 and 2000

On or about February 1, 1999, Mr. Everett became the Contracting Office Representative based at Birchwood. In May of 1999, North Star was notified that it would receive a incentive fee of $3,730 for 1998. The letter announcing this fee cited the survey results as the primary reason why the fee was so low, but did not mention budget considerations, despite the rationale expressed in Mr. Peterson's internal memorandum.

In the months that followed, increasing disagreements occurred between the parties concerning downtime calculations, stockpiling and

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[18] Those results indicated, for example, that 49 percent of the residents were dissatisfied with North Star's "decision" to eliminate the self-help store. Perhaps not surprisingly, 46 percent of the residents said that carpeting should be replaced every seven years, while 44 percent said that it should be replaced more frequently.

various other issues. Mr. Peterson continued to believe that he was not receiving adequate support from the contracting officer. For example, on September 9, 1999, he e-mailed Mr. Klein, complaining that Mr. Everett had not been present at several meetings, indicating that his absence was a "major failure" and "pretty embarrassing to me." Mr. Peterson, however, apparently was unaware that Mr. Everett was on vacation, a point that Mr. Klein made on September 13, 1999, in explaining the situation to his superior, Lt. Col. Sheldon Jahn. In that e-mail, Mr. Klein indicated that "[t]here will always be unpopular COR determinations but I fully expect each call to be based upon the contract/lease provisions and made without prejudice to any of the parties." Col. Jahn responded to Mr. Klein, indicating, in reference to Mr. Peterson, "I am not sure why there always seems to be this immediate accusation approach to concerns." Nonetheless, Mr. Peterson continued to send Mr. Klein e-mails requesting that changes be made in draft contracting officer decisions (CODs). In one e-mail, dated October 25, 1999, Mr. Peterson made several recommendations regarding a pending COD concerning an incentive fee award, indicating that the decision should refer to North Star's alleged policy of "establishing a 'below market' wage scale for Birchwood employees." A November 8, 1999, e-mail from Mr. Everett to Mr. Peterson invites comments on a draft of a position paper that indicates that "Fair Wear and Tear determinations cannot be used to create a de-facto depreciation schedule."

On December 17, 1999, Mr. Peterson again shipped out an e-mail in advance of the incentive fee meeting, urging once more that North Star not

receive an award. In another e-mail dated December 29, 1999, he elaborated on why he opposed an award, stating, "remember that if we award even $1, this goes into the record books as an *exceptional* rating." (Emphasis in original). An attachment to this e-mail indicated that one of the reasons that Mr. Peterson was opposed to giving North Star an incentive fee for 1999 was because North Star was challenging, in this court, the diminished fee it received in 1998.

As the year 2000 unfolded, the parties disagreed as to which government officials were empowered to order North Star to perform work. North Star asserted that only the contracting officer had this authority, but that view was rejected by Mr. Klein. The latter, in a February 24, 2000, letter to North Star emphasized that the Army's Project Manager "has the authority and responsibility to identify maintenance needs and to direct North Star to perform maintenance as required." On February 29, 2000, Col. Mark C. Nelson, by then the new Director of Public Works, notified North Star that no incentive award would be made for 1999. Col. Nelson's letter cited a variety of reasons for this decision, among them statistics taken from the most recent resident survey.[19] The dispute between the parties involving refuse collection took a new turn when, in April of 2000, the Army indicated that North Star could no

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[19] The 1999 resident survey continued to raise issues before the residents that were being disputed by the parties. Among other things, it indicated that under the contract, "[e]xterior painting" is scheduled "at five year intervals or 'more often as required,' " and asked the residents to evaluate North Star's painting efforts in light of this requirement.

longer use the Fort Wainwright landfill for household trash. While North Star complained about this action, the record reveals that the landfill was closed to all such trash for environmental reasons, and not just to trash collected by North Star.

In May of 2000, the parties negotiated what they believed was a settlement of the 1998 lawsuit. Apparently under the settlement, defendant eliminated various practices-for example, the Army began to spread the release of units to North Star over a calendar week, rather than concentrating them on a single day.[20] Depreciation also ceased. Yet, various new debates continued to arise among the parties, including disputes over who was responsible for replacing $13 butter dishes and $10 ice trays. In September of 2000, Connie Kiser became the 801 housing project manager. In December of that year, North Star issued a series of memoranda complaining that the Army was not enforcing various safety and cleanliness regulations. On December 19, 2000, North Star filed notice in this court that it was rescinding the settlement agreement.

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[20] Describing the impact this change wrought, Mr. Wartes testified:

> Q: Was there impact on your workload as a result of that?
>
> A: Immediately scheduling was easier. I had units to schedule all week, instead of one day or two days of the week. I had units that weren't filling for a couple of days without having work done in them, because I had six of them at the same time. Yes, it made things much easier.

5. 2001 and 2002

On January 30, 2001, Mr. Peterson again relayed complaints to Mr. Klein regarding the level of support that Public Works was receiving from Mr. Everett, indicating that his superior "feels that Rod [Everett]'s position should be more responsive to supporting our requirements (specifically to supporting Connie [Kiser]), more proactive, and most importantly, accomplishing measurable results." Later, on January 31, 2001, in discussing another dispute in which Mr. Wartes indicated that he would not take direction from Ms. Kiser, Mr. Peterson e-mailed Mr. Klein, stating that Mr. Wartes's position precluded an incentive fee award for 2000 and that "[i]t's time to back [Ms. Kiser] 100%." By at least this time, the parties began to have additional disputes regarding the inspections under the Lease, with issues arising concerning the timing and notification of those inspections and whether the Army was entitled to conduct inspections at times not specified in the Lease. Apparently commenting on those disputes, on February 9, 2001, Mr. Peterson sent Mr. Klein and others an e-mail in which he stated-

> If our project manager's interpretation of the lease is correct, this should be completely and clearly expressed to [North Star] by Rod.
>
> If there is lease ambiguity, our project manager's position should still be supported as completely and clearly as possible by Rod. He is not paid to be neutral, but to aggressively support a reasonable government position.

In June of 2001, the Army announced that North Star would not receive an incentive award for 2000, citing again the resident surveys,[21] as well as excessive downtime, but also referring to an issue involving overcharges for lock installation.[22]

On July 24, 2001, Lt. Col. Michael T. Meeks, the Director of Public Works, issued a memorandum to the Army Engineer District requesting that a protocol be established under which all contracting officer decisions would be reviewed by employees in Public Works. This memorandum requested that "[a] staff summary ... shall be attached to each draft COD and this will be used by the FWA Housing Office to note concurrence/noncurrence and any comments." The memorandum further indicated that-

> [i]n the event of nonconcurrence, the USARAK staff, including the Staff Judge Advocate will review the draft COD. A summary of the USARAK and proposed changes in wording will be provided to the Office of Real Estate and reviewed prior to finalizing the COD.

Col. Meeks added that "[t]his procedure will insure that Public Works and USARAK comments are

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[21] Among the questions on the 2000 survey was "[h]ow satisfied are you with the twice weekly curbside refuse collection?"

[22] Regarding the latter point, a June 15, 2001, letter from the Army to Mr. Wartes cited North Star for "[k]nowingly charging the government and military families for new materials while recycling used lock-sets." The record, however, suggests that by this time, North Star already had admitted this mistake and had reimbursed the Army for the charges involved.

reviewed and incorporated, as appropriate," and listed Mr. Peterson as the contact for this action. Various documents in the record, as well as testimony at trial, indicate that this procedure was implemented at least as early as August 17, 2001.

In a November 5, 2001, e-mail, Mr. Peterson recommended that the lockset issue, as well as other unidentified allegations of fraud, warranted an outside investigation of North Star by the Army's Internal Review and Audit Compliance Office Army (IRACO). In this e-mail, Mr. Peterson asserted that "[t]his issue continues to preclude any consideration for incentive award until it is finally resolved to the government's satisfaction." By early December of 2001, he and Ms. Kiser decided that they would require North Star to submit individual invoices for certain repair and replacement items, even though the Lease seemingly provided that such items would be listed in a repair cost book to be negotiated annually by the parties. In one e-mail sent to Mr. Peterson, Ms. Kiser stated: "I feel that the lock set issue is just the tip of the ice berg." On December 11, 2001, Mr. Peterson sent an e-mail to the contracting officer and a variety of other Army personnel citing the lockset issue and the resulting audit as grounds for denying North Star any incentive fee for 2001.

In January of 2002, Mr. Harold Hopson replaced Mr. Klein as the contracting officer for the Lease. On January 8, 2002, a hearing was held in this case at which defendant's motion for summary judgment to enforce the settlement agreement was denied. On January 15, 2002, Ms. Harrell e-mailed Col. Meeks complaining about a variety of issues and indicating that "[t]he bottom line [is] we want to get rid of the

settlement." On January 28, 2002, Mr. Hopson wrote North Star indicating that defendant was withdrawing from the settlement agreement and would seek to recoup any payments made to North Star based upon that agreement.

Following the collapse of the settlement agreement, the situation worsened considerably. Almost immediately, and despite howls of complaint from North Star, Mr. Peterson and Ms. Kiser resumed the practice of stockpiling, releasing units in groups of eight on Mondays and Fridays without regard to how long the units had been vacant. In February of 2002, the Army indicated that it had received the results of the IRACO audit, which had found that various work authorizations were missing from the Birchwood files. In a letter dated February 28, 2002, which is not in the record, but referenced by other correspondence, Col. David B. Snodgrass indicated that the missing files precluded the Army from considering a performance award for North Star for 2001 or for any part of 2002 for which the issue remained unresolved. On March 6, 2002, Ms. Kiser forwarded to North Star the repair list for 2002, substantially reducing the number of items listed therein and emphasizing that "[a]ll items not included in the list will require invoicing at the time the work is required." Extending a concept that previously had been applied only to a few items (*e.g.*, carpeting), her memorandum further indicated that "[p]rices approved in this listing are subject to depreciation to be determined on a case by case basis."

On March 15, 2002, Mr. Wartes wrote Col. Snodgrass objecting to his incentive fee

determination. This letter indicated that the overcharges regarding the locksets involved $135, which had already been refunded to the Army (possibly as early as November of 2000). The letter also asserted that the Birchwood files that allegedly were missing had been pulled for a spreadsheet analysis, that North Star had shown the auditors the boxes containing those files, but that the auditors had declined an invitation to review those documents. North Star indicated that the auditors had not complained about any missing files and that the first that it became aware there was a continuing issue concerning the files was when it received the incentive fee letter. Apparently prompted by a memorandum received from Ms. Kiser, on April 17, 2002, Mr. Everett wrote Mr. Wartes complaining about excess downtime in February and March 2002, and indicating that liquidated damages of $2,874.47 would be deducted from the next rental payment. On April 30, 2002, North Star wrote Mr. Everett requesting that he provide the backup documentation for his downtime calculations. In the succeeding months, particularly, in May of 2002, the parties continued to dispute a variety of issues, including whether Ms. Kiser was authorized to modify unilaterally the repair cost book and to require invoices for the items not covered in her price list. In internal e-mails dated May 22, 2002, a representative from IRACO indicated that the lockset issue alone was insufficient to warrant further audit, but that an expansion of the audit, nonetheless, should be sought. By way of explanation, the auditor indicated that "our audit results, used as evidence, could prove crucial in supporting our (the Govt) [sic] case against the lawsuit brought by North Star." The same day,

Mr. Peterson responded that his office "greatly support[s] expanding the investigation."

Again prompted by a memorandum sent by Ms. Kiser, on May 22, 2002, Mr. Everett sent North Star a letter asserting that there had been excess downtime in April and assessing liquidated damages in the amount of $2,308.25. On May 24, 2002, Mr. Wartes responded to this letter, asserting that "[n]o justification has been provided for your calculation of excess downtime," and indicating that he had still not received a response to his April 30, 2002, request for the backup documentation for defendant's calculation of downtime for February and March. On June 27, 2002, Ms. Rhonda Sekyra, North Star's Treasurer, wrote Ms. Kiser cataloguing the problems that North Star was experiencing regarding the turnover of units, including the Army's practices of: (i) revising turnover dates and failing to provide timely notifications; (ii) not distinguishing between change of occupancy downtime and repair and renovation downtime; (iii) failing properly to conduct pre-termination inspections; and (iv) failing to issue proper work authorizations. The record reveals that disputes involving individual units continued throughout this period. In July of 2002, the parties again exchanged correspondence, in which the Army reemphasized that Ms. Kiser was authorized to direct North Star to perform work. In a letter dated July 18, 2002, Mr. Wartes highlighted that the Army had apparently begun using depreciation in calculating the reimbursement owed North Star for blinds and counter tops replaced as the result of occupant damage.

On July 31, 2002, Mr. Everett sent North Star a letter in which he determined that there was excess downtime for May and June of 2002, indicating that $2,350.61 would be deducted from North Star's next rental payment. On August 1, 2002, Mr. Wartes contested this determination and again demanded back-up documentation, while noting that requests for such documentation for February, March and April had still not been satisfied. On August 8, 2002, Mr. Wartes wrote Ms. Kiser alleging a new practice-that the Army was ignoring pet damage, leaving it to North Star to determine whether carpeting so damaged would be left in a unit or replaced at its expense.[23] Correspondence during this period also suggests yet another new bone of contention between the parties-indications that Ms. Kiser was inspecting units outside of the regular turnover regime, at which inspections North Star representatives were not present, and using information obtained during those inspections as a basis for requiring North Star to perform repairs and maintenance.

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[23] Commenting on the impact of this, Mr. Wartes testified-

> This is just one of many types of instances where there was a double standard, where the government when it perceived it was damaged, you know, it would be their responsibility. They would note it, and let it go on for [the] next occupant versus the most infinitesimal thing they could find that they would perceive to be North Star's responsibility, they would force us to replace it.

At another point in his testimony, Mr. Wartes noted that the practice of not repairing occupant damage gave residents the false impression that North Star was not maintaining Birchwood, thereby negatively impacting North Star's scores in the resident surveys.

On August 29, 2002, Mr. Peterson sent an e-mail to Ms. Kiser, with copies to various other officials, in which he summarized the results of the then completed IRACO audit. This email indicated:

> We had a pre-final briefing today. The final audit will document a series of relatively minor problems which we will pass on to [North Star] to correct, but no real big ticket items. There is about $20K in double billings which we will ask [North Star] to correct and reimburse, but most of that appears to be from Ed Miller's sloppy work, not any [North Star] conspiracy.
>
> The audit will document a quantum improvement in the quality of government oversight since Connie took over, and all auditors emphasized what a great job you are doing (as measured by the sharp decline in gov [sic] work authorizations and challenges to their attempts to charge the government). Well done!

Other documentation in the record verifies that the monthly work authorizations issued by the Army to North Star went from $13,468.08 per month in 2000, to $15,039.60 per month in 2001, and then down to $5,257.15 per month in 2002. An e-mail from Ms. Kiser indicates that this reduction was "due to imposition of depreciation schedule and aggressive monitoring of occ[upant] damage vs fair wear."[24]

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[24] In her deposition, Nikisha Goins, formerly one of the government inspectors at Birchwood, provided a much different impression as to how these work authorizations were reduced.

On September 4, 2002, North Star filed a claim with Mr. Hopson detailing numerous alleged violations of the Lease, accusing the Army of: (i) failing to oversee occupant conduct; (ii) failing to issue work authorizations for occupant-caused damage; (iii) issuing improper and untimely work authorizations that reduce or eliminate the amount owed to North Star; (iv) failing to issue work authorizations that employ the List of Repair Costs; (v) taking depreciation on all replacement items (*e.g.*, flooring, counter tops, blinds, and appliances); (vi)

Describing Ms. Kiser's *modus operandi*, Ms. Goins commented that "I think I would say I was ... being used as a tool to make North Star pay for stuff." She further explained that Ms. Kiser instructed her, as follows:

> Just that when I'm doing inspections, you know, ... either Eldon [Wartes] has to pay for it or the occupants have to pay for it.... It was pretty much I was being used to go out there to do the inspection, assess the damages but bring as less charges back to the government as possible in other words.

Along these same lines, Ms. Goins specifically stated that Ms. Kiser had directed her to save the government money and that, correspondingly, the Army failed to replace items at Birchwood that it replaced at other housing facilities at the fort. "[N]othing was coming out of [Ms. Kiser's] pocket," she stated, "[i]t was either the occupant was going to pay for it or Eldon was going to pay for it." Amplifying the latter point, she indicated that in her view the military families "got a raw end of the deal living at Birchwood," as "every little thing" was charged to them. Ms. Goins further indicated that one of the other inspectors cautioned her to keep copies of her inspections because Ms. Kiser would change the results, sometimes without even seeing the unit involved. In particular, she indicated that she made copies for "[t]he ones that were kind of shady ... the ones that were like I didn't feel comfortable."

using additional inspections as the basis for ordering maintenance and repairs; (vii) deviating otherwise from the turnover inspection regime specified by the Lease; (viii) placing a disproportionate number of temporary occupants at Birchwood; (ix) assessing liquidated damages against North Star and the failure to provide documentation for the calculation of those damages; and (x) failing to make incentive fee awards to North Star. North Star attributed these various violations to "bad faith," asserting, in particular that "[t]he Government's discriminatory treatment of Birchwood constitutes a bad faith violation of the Government's contractual obligation to oversee the day-to-day administration of the housing units and to enforce Army Family Housing rules and regulations." Among other things, the claim sought damages corresponding to the diminution in the value of Birchwood, a figure set at $12,146,000, as well as additional expenses for 1996 through 2001, totaling $813,390, for an overall damages figure of $12,959,390. Two days following the filing of this claim, on September 6, 2002, Mr. Peterson e-mailed Ms. Kiser recommending that she "install[ ] a trap door in front of your desk which you can release when Eldon [Wartes] is standing on it in front of your desk. Connected to a chute to the Chena River."

In the ensuing months, the parties continued to dispute a variety of issues, including whether the Army was obliged to have a North Star representative at the final inspections and whether depreciation was applicable to various items. These exchanges were marked by further charges and counter-charges of "bad faith." On October 11, 2002, in an e-mail to Mr. Fischer, Mr. Wartes asserted that

Ms. Kiser was signing documents for inspections that she had not conducted (a practice that was confirmed by the testimony of two of her employees). On or about October 15, 2002, it appears that Ms. Kiser introduced yet another requirement-that upstairs and downstairs carpeting needed to match in color (*e.g.*, that if the upstairs carpet was brown, the downstairs carpet had to be brown, or both needed to be blue). In an undated memorandum issued at about this time, Ms. Kiser noted that even where carpeting was being replaced due to occupant damage, North Star was obliged to replace, at its expense, other carpet in the unit to ensure that the old and new carpeting matched. At about the time of this memorandum, Mr. Peterson began transitioning into retirement (an event punctuated by the infamous "Miami football" e-mail that began this opinion). On October 15, 2002, Mr. Wartes wrote Ms. Barbara S. Lehman, who had replaced Mr. Peterson, complaining that the surveys designed by the Army were biased against North Star.

Various e-mails sent in October of 2002 indicate that, despite the meager findings produced by the first IRACO audit, various Army personnel were attempting to convince Congressional staffers that North Star's claims should be the subject of a Government Accounting Office audit. In November of 2002, Ms. Kiser adopted a new practice in regards to painting. Specifically, the Lease envisioned that a unit would be painted if it became vacant after certain specified Lease anniversary dates (*e.g.*, November 6, 2002), whether or not an inspection actually revealed a need for painting. The record indicates that in the latter part of 2002, Ms. Kiser began twin practices designed to maximize such

cyclical paintings-the first was to hold units vacant until after the anniversary date had passed; the second was to assign units to temporary occupants, so that the unit would become vacant shortly after the anniversary dates. In some instances, these practices, which were confirmed by the testimony of the former inspectors, required units to be fully painted twice within a matter of months. On November 19, 2002, North Star filed its complaint in Case No. 02-1632C. In December of 2002, the parties traded complaints, each asserting that the other was attempting to reduce costs by avoiding its responsibilities under the Lease. The Army's position in this regard was voiced in an audit document released by IRACO on December 17, 2002, while North Star's response took the form of a December 24, 2002, letter to Mr. Hopson.

6. 2003 and Forward

On January 30, 2003, Acting Housing Division Chief Cynthia Larson e-mailed Mr. Hopson to complain about a draft COD that apparently did not hold that depreciation was applicable to counter tops and other materials installed in units. In this e-mail, Ms. Larson wrote-

> Rod [Everett] provided Connie [Kiser] with the draft for the COD on the above mentioned units [646 and 833]. I have some grave concerns with [the] findings. We have already been down this road before and DO NOT want to go down it again. The issue of depreciation is not up for discussion, as we see it. Our direction came specifically from

> Don Kinner, DOJ in a teleconference with the COE, Housing, and DOJ, in which he stated depreciation will apply to everything; where the question was asked specifically, does depreciation apply only to carpet or all repair items. Don Kinner's [sic] stated it applied to everything. I believe if we allow this COD to go out as is, we are opening ourselves up for complete failure on all key issues and litigation will CONSUME our daily efforts.
>
> The contract states any repair or replacement shall match in kind and color to all adjacent surfaces. With this said, we have been applying this to all repairs and as I under[stand], Ann is stating that this is only applicable to carpet replacement and no other repairs. Again, our stand has to be unified and we have not been applying this concept, based on guidance from the COE. We CANNOT change ships mid stream, if we do, all previous work will be negated, and the judge has already accused us of inconsistency in our methodologies.
>
> I feel with this being such a SIGNIFICANT change to the day to day operations, we need to have a meeting and discuss PRIOR to this COD being released and come up with a CONCRETE PLAN of action. I feel precedence will be set and HOLD ON, we're on the roller coaster again.

(Emphasis in original). On January 31, 2003, Mr. Hopson sent North Star the final version of the COD regarding units 646 and 833. That COD indicated

that "[c]ountertop material will be depreciated based upon a schedule to be determined by the Government after North Star submits pertinent cost information." On February 12, 2003, Mr. Hopson e-mailed Ms. Harrell, indicating that the comments on draft CODs provided by her office were "invaluable."

On February 20, 2003, Col. Snodgrass sent North Star a letter denying it any incentive fee for 2002. As basis for this decision, the letter cited, *inter alia*, the audit and the lockset issue, the results of the resident survey,[25] and North Star's practice of challenging Ms. Kiser's authority to direct work. On March 4, 2003, North Star responded to this letter. It noted that the lockset issue-which the December 2001 IRACO audit had revealed involved only $135-had been used "to deny incentive fee awards to North Star since 2000." North Star further complained that the resident surveys were biased against it, specifically asserting that the surveys were designed to give residents the false impression that North Star was at fault for the Army's failure to enforce certain policies (*e.g.*, pet control). On March 24, 2003, the Army provided North Star with a summary of the findings of the IRACO follow-up investigation that was conducted between May and August of 2002. Those findings continued to maintain that the facility history files did not contain the work authorizations that were approved by the Army. The audit also verified that,

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[25] Among the questions asked by the 2002 survey were "[h]ow satisfied would you be with less than the twice-weekly trash pickup you now receive?" Although inartfully framed, this question again raised with the tenants an issue being debated by the parties.

in four instances, North Star had installed used locksets and billed the Army for the installation of new ones. The summary concluded that "IRACO's findings have been forwarded to the Army's Criminal Investigation Command to determine whether further investigation is warranted." On March 28, 2003, the court granted defendant's motion to stay the 1998 case pending the resolution of the criminal investigation; that stay remained in force until May 5, 2004.

During the first quarter of 2003, the parties continued to argue over inspection procedures, with the Army maintaining that it had the right to inspect units at any time and North Star asserting that such *ad hoc* inspections could not supplant the inspection protocols established by the Lease. Ultimately, this dispute led to a contracting officer decision, dated May 22, 2003, which held that while the Army could conduct additional inspections, "North Star must be notified of and permitted to attend any inspection being performed for the purpose of identifying maintenance requirements." Many of the issues previously identified continued to be hot topics of dispute between the parties for the remainder of 2003 and into 2004. As if these were not enough, two new sets of issues were raised during this period. First, a variety of issues arose when the Army, on June 5, 2003, ordered North Star to perform cleaning services that had previously been performed by another Army contractor-the Army afforded North Star five additional days of down time where a "full cleaning is required," but indicated that additional down time would be determined by the Army on a case-by-case basis where "only a partial cleaning or a minimum amount of cleaning is required." Second, in a letter

dated July 10, 2003, North Star accused the Army of refusing to authorize work for occupant damage, but then, upon a later change of occupancy, insisting such work was required by fair wear and tear. During this period, stockpiling continued, periodically spiking[26] and the conflict between the parties was further heightened when Ms. Kiser, for the first time, used a black light to determine that the painting in a unit was inadequate, thereby allegedly identifying flaws that were not visible to the naked eye.

On November 20, 2003, plaintiff filed its complaint before this court in case No. 03-2699C. On March 9, 2004, the Army denied North Star an incentive fee for 2003, citing many of the issues that had been raised in prior award decisions (although not raising the lockset issue). In June of 2004, Ms. Lori Dallas replaced Ms. Kiser as the Housing Project Manager/Site Manager of Birchwood.

D. Proceedings to Date

As noted, on March 9, 1998, North Star filed its initial complaint in this case. In 1998 and 1999, there were numerous disputes between the parties involving electronic discovery and other issues. On August 23, 1999, North Star filed an amended

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[26] For example, on Friday, August 8, 2003, Ms. Kiser released four units, all of which required extensive subcontractor work. Then, on Monday, August 11, 2003, she released five more units requiring subcontractor work. The nine units released on those days had been vacant, prior to being turned over to North Star, for time periods ranging from 28 to 82 days.

complaint. On April 6, 2000, Judge Bruggink stayed the case pending settlement discussions. On May 26, 2000, the parties entered into an agreement establishing the preliminary terms of a settlement. On December 19, 2000, North Star filed a notice of recision, claiming that the settlement agreement remained unconsummated. On January 3, 2001, this case was reassigned to the undersigned. On June 14, 2001, defendant filed a motion for summary judgment, seeking to enforce the settlement. Following briefing, on January 9, 2002, the court denied the motion for summary judgment, based upon the existence of genuine issues of material fact. On January 31, 2002, defendant issued its own notice of recision of the settlement and the settlement thereby was deemed abandoned.

Further discovery ensued. On April 16, 2002, North Star filed a second amended complaint. On April 19, 2002, defendant filed a motion for summary judgment on the merits of this case. On June 3, 2002, the court scheduled this case for a trial to begin on October 16, 2002. Following additional discovery, the court, in an unpublished opinion dated July 3, 2002, granted, in part, and denied, in part, defendant's motion for summary judgment. Thereafter, the parties indicated that they were making substantial progress toward settlement, leading the court, on July 19, 2002, to postpone the trial and further stay the case. Settlement, however, did not materialize. On March 12, 2003, defendant, at a status conference, requested that the case be further stayed pending completion of the Army Criminal Investigations Division investigation of North Star. Before this request was acted upon, on March 28, 2003, North Star filed a motion for summary

judgment. After additional filings regarding the criminal investigations were received, the court granted defendant's request and the case was stayed (with periodic progress reports) until May 5, 2004. On that day, the court lifted the stay, in part, to allow defendant to respond to the plaintiff's March 28, 2003, motion for summary judgment. Shortly after this response was filed, further discovery disputes arose. On September 2, 2004, the court consolidated Case Nos. 02-1632C and 03-2699C with the earlier 1998 case. On October 4, 2004, the court issued an order granting, in part, and denying, in part, plaintiff's summary judgment motion. On January 18, 2005, the court issued an order requiring expert discovery and establishing a trial date of August 15, 2005.

Trial in this case occurred between August 15 and 23, 2005, at which both fact and expert witnesses were presented. Further trial in this matter was conducted on September 2, 2005. Following the filing of extensive post-trial briefs, closing argument in this case occurred on July 20, 2006.

II. DISCUSSION

With the foregoing findings as reference points, the court proceeds to consider the claims made by plaintiff and defendant's responses thereto.

A. Jurisdiction

In a motion *in limine* filed before trial, as well as during its closing argument and in its post-trial briefs, defendant asserted that a variety of the claims

raised by plaintiff in its amended complaints should be dismissed for lack of jurisdiction. It contends that these claims were not properly filed with the contracting officer and that no decisions, therefore, were rendered on these matters. Because subject matter jurisdiction is a "threshold matter," it must be addressed before the court turns to the merits. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998); *Nippon Steel Corp. v. United States,* 219 F.3d 1348, 1352 (Fed. Cir. 2000).

This court has "jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under ... the Contract Disputes Act of 1978 [(CDA)]." 28 U.S.C. § 1491(a)(2); *see also Applied Cos. v. United States,* 144 F.3d 1470, 1477 (Fed. Cir. 1998). In this framework, the "strict limits" of the CDA constitute "jurisdictional prerequisites to any appeal." *England v. The Swanson Group, Inc.,* 353 F.3d 1375, 1379 (Fed. Cir. 2004) (citing *Sharman Co. v. United States,* 2 F.3d 1564, 1569 n. 6 (Fed. Cir. 1993)). Hence, jurisdiction is lacking "unless the contractor's claim is first presented to the contracting officer and that officer renders [or is deemed to render] a final decision on the claim." *England,* 353 F.3d at 1379; *see also D.L. Braughler Co., Inc. v. West,* 127 F.3d 1476, 1480 (Fed. Cir. 1997); *James M. Ellett Constr. Co. v. United States,* 93 F.3d 1537, 1541 (Fed. Cir. 1996); *Bath Iron Works Corp. v. United States,* 20 F.3d 1567, 1578 (Fed. Cir. 1994). And these requirements must be met separately for each claim raised-there is no pendent or ancillary jurisdiction. *See Joseph Morton Co. v. United States,* 757 F.2d 1273, 1281 (Fed. Cir. 1985); *see also Health Ins. Plan of Greater N.Y., Inc. v. United States,* 62 Fed. Cl. 33, 48 (2004).

Section 605 of the CDA expressly requires that "[a]ll claims by a contractor against the government ... shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a); *see also England,* 353 F.3d at 1379. Where the amount of a claim exceeds $100,000, the claim must be certified by the contractor. 41 U.S.C. § 605(c)(1). While the CDA does not define further the content of a "claim," FAR § 2.101 defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 2.101; *see also England,* 353 F.3d at 1379; *Reflectone, Inc. v. Dalton,* 60 F.3d 1572, 1575-76 (Fed. Cir. 1995). This definition, which has often been employed by courts analyzing whether the CDA requirements are met,[27] thus distinguishes between claims that seek monetary relief and other types of demands involving "the adjustment or interpretation of contract terms" or "other relief arising under or relating to the contract." Neither type of claim must be submitted "in any particular form or use any particular wording." *Contract Cleaning Maint., Inc. v. United States,* 811 F.2d 586, 592 (Fed. Cir. 1987); *see also Transamerica Ins. Corp. v. United States,* 973 F.2d 1572, 1578 (Fed. Cir. 1992) ("certain 'magic words' need not be used and the intent of the 'claim' governs"); *Engineered Demolition, Inc. v. United*

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[27] *See, e.g., Envtl. Tectonics Corp. v. United States,* 72 Fed. Cl. 290, 294 (2006); *Renda Marine, Inc. v. United States,* 71 Fed. Cl. 378, 387 n. 9 (2006).

States, 70 Fed. Cl. 580, 587 (2006). Indeed, various cases suggest that a claim may arise from the combination of more than one document submitted to the contracting officer. *See Clearwater Constructors, Inc. v. United States,* 56 Fed. Cl. 303, 309 (2003); *Exec. Ct. Reporters, Inc. v. United States,* 29 Fed. Cl. 769, 774 (1993) ("a series of letters can be read together to comprise a clear and unequivocal statement giving the contracting officer notice of the basis for the contractor's claim"); *Al Munford, Inc. v. United States,* 30 Fed. Cl. 185, 189 (1993) ("Such a statement may be in the form of one or several documents.").

In other regards, the requirements for monetary and nonmonetary claims diverge somewhat. The Federal Circuit has described the requirements of a monetary claim in practical terms, stating that "[a]ll that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Scott Timber Co. v. United States,* 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Contract Cleaning,* 811 F.2d at 592); *see also Ace Constructors, Inc. v. United States,* 70 Fed. Cl. 253, 266 (2006). Consistent with this "common sense" view, this court has consistently interpreted the "sum certain" requirement to include amounts in dispute that "can be easily determined by a simple mathematical calculation or from the contractor's submission to the contracting officer." *Metric Constr. Co. v. United*

States, 14 Cl. Ct. 177, 179 (1988).[28] In this regard, the claim must provide enough specificity so as to meet the twin purposes of the CDA's administrative exhaustion requirement-to screen out unwarranted or inflated claims, *see CPS Mech. Contractors,* 59 Fed. Cl. at 764; *Kirkham Constrs., Inc. v. United States,* 30 Fed. Cl. 90, 93 (1993) (citations omitted), and to facilitate resolution of contract disputes by negotiation, at the agency level, rather than by litigation, *H.L. Smith, Inc. v. Dalton,* 49 F.3d 1563, 1566 (Fed. Cir. 1995) (citations omitted); *see also* S. Rep. No. 95-118 at 7-8 (1978) (claim requirement was to "induce resolution of more contract disputes by negotiation prior to litigation"). If no sum certain is specified, the contracting officer cannot settle the claim by awarding a specific amount of money "because such a settlement would not preclude the contractor from filing suit seeking the difference between the amount awarded and some larger amount never specifically articulated to the contracting officer." *Exec. Ct. Reporters,* 29 Fed. Cl. at 775; *see also CPS Mech. Contractors,* 59 Fed. Cl. at 765.

By comparison, a nonmonetary claim-one seeking, for example, the interpretation of contract terms-need not seek a "sum certain." *See CW Gov't Travel, Inc. v. United States,* 63 Fed. Cl. 369, 382 (2004); *Clearwater Constructors, Inc.,* 56 Fed. Cl. at 309 ("To state a non-monetary claim there is no requirement that the contractor make a request for a sum certain."); *GPA-*

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[28] *See also CPS Mech. Contractors, Inc. v. United States,* 59 Fed.Cl. 760, 764 (2004); *Exec. Ct. Reporters,* 29 Fed.Cl. at 775; *Sun Eagle Corp. v. United States,* 23 Cl.Ct. 465, 472 (1991).

I, LP v. United States, 46 Fed. Cl. 762, 767 (2000). Rather, "the phrase 'as a matter of right' in the regulatory definition of a 'claim' requires only that the contractor specifically assert entitlement to the [nonmonetary] relief sought. That is, the claim must be a demand for something due or believed to be due." *Alliant Techsystems, Inc. v. United States,* 178 F.3d 1260, 1265 (Fed. Cir. 1999); *see also CW Gov't Travel,* 63 Fed. Cl. at 383. Such a claim, if denied or deemed denied, thus supplies the prerequisite for this court to exercise jurisdiction in a case in which a contractor is seeking merely declaratory relief. *Alliant Techsystems,* 178 F.3d at 1268; *Garrett v. General Elec. Co.,* 987 F.2d 747, 750-51 (Fed. Cir. 1993).

Defendant asserts that more than a dozen of North Star's monetary claims were not presented to the contracting officer with sufficient detail so as to meet the regulatory definition of a "claim," particularly the "sum certain" requirement thereof. Plaintiff does not contend that there is a single document that establishes, for any of these questioned monetary claims, a "sum certain" request. Rather, it contends that the amounts sought as to these claims were "easily calculable" based upon information accessible to the contracting officer at the time the claims were made-information either supplied by plaintiff or originating with defendant. Essentially, plaintiff asserts that the respective contracting officers should have been able to take cost, billing or other accounting information that they had, combine it with various requests made by plaintiff for money owed, and arrive at the "sum certain" that plaintiff was seeking. The court is sympathetic to plaintiff's plight, particularly given the specter that significant time was expended at trial on claims that were

belatedly attacked by defendant on jurisdictional grounds. Indeed, to date, defendant has provided no acceptable explanation as to why it did not perceive the alleged jurisdictional defects until, in some instances, the eve of trial, and, in other instances, even after trial. Yet, it is axiomatic that subject matter jurisdiction may be raised at any time. *See Folden v. United States,* 379 F.3d 1344, 1354 (Fed. Cir. 2004), *cert. denied,* 545 U.S. 1127 (2005); *Fanning, Phillips & Molnar v. West,* 160 F.3d 717, 720 (Fed. Cir. 1998). And the fact is-discomforting or not-that jurisdiction is lacking as to many of the challenged monetary claims.

While plaintiff suggests that administrative claims can be cobbled together from various documents that were possessed by defendant, as to most of the claims at issue, there are no select group of documents, supplied by plaintiff or otherwise, that provide a "clear and unequivocal" indication as to the amount sought by plaintiff. Contrary to plaintiff's importunings, determining a sum certain for many of these claims is not a matter of simple mathematics. In some cases, only portions of the relevant costs are documented; in others, historical cost data is available for similar transactions, but not for those that are the subject of the claim; and in still others, the relevant data is entirely missing.[29] Moreover,

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[29] Indicative of this, the amounts plaintiff has sought as to some of its claims have shifted significantly during the course of this litigation. This is perhaps best exemplified by comparing North Star's damage estimates before and after trial, as the following chart reveals:

while the decisional law suggests that several documents may be combined into a claim for purposes of the CDA, that combination must still make clear how much the plaintiff is willing to accept in settlement of its claim. Thus, for example, multiple documents seemingly could form a claim if one unambiguously stated the costs involved and another cross-referenced the earlier document and sought a final decision to recover those costs. *See, e.g., Al Munford*, 30 Fed. Cl. at 189-90; *see also Contract Cleaning Maint.*, 811 F.2d at 588-89, 592.[30] But, such is not the case where various documents list the costs involved with an issue, but no document definitively claims all or some specified amount of those costs. To hold, in the latter situation, that the administrative exhaustion requirements of the CDA are satisfied would be to defeat the primary purpose for having those requirements, which, as noted, is to provide the

Increase in operating expenses	$1.3 million	$1.3 million
Decrease in market value of Birchwood	$8.6 million	$8.6 million
Other damages not covered above	$1,602,730	$2,639,565

It is, of course, the last of these three categories in which the claims jurisdictionally challenged by defendant primarily lie.

[30] Such an approach, indeed, is envisioned by 48 C.F.R. § 2.101, which, in defining "claim" states that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a)."

agency with a concrete opportunity to settle the claim in advance of litigation. Such a holding threatens legal uncertainty in an area of law that is reasonably well-settled, a result unwarranted even by the belatedness of some of defendant's jurisdictional arguments.[31]

Nor does the so-called "enlarged claim" doctrine offer plaintiff any solace here. Under this doctrine, additional compensation may be sought, without prior certification by a contracting officer's final decision, for "new matters inherent in the claims previously presented." *Miller Elevator Co. v. United States,* 30 Fed. Cl. 662, 701 (1994).[32] For the doctrine to apply-(i) "the increase in the amount of the claim [must be] based on the ***same set of operative facts*** previously presented to the contracting officer;" and (ii) "the contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim."

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[31] Nor will this court hold, as plaintiff suggests, that the contracting officers here had an independent obligation to obtain a listing of the specific costs at issue. The obligation to request a sum certain plainly lies squarely on the contractor's shoulders and cannot be off-loaded in the fashion plaintiff seeks.

[32] *Accord Cerberonics, Inc. v. United States,* 13 Cl.Ct. 415, 417 (1987) ("If the complaint brought here is based on the same set of operative facts underlying the claim presented to the contracting officer, then this court has jurisdiction...."); *J.F. Shea Co. v. United States,* 4 Cl.Ct. 46, 54 (1983) ("It would be most disruptive of normal litigation procedure if any increase in the amount of a claim based upon matters developed in litigation before the court had to be submitted to the contracting officer before the court could continue to a final resolution on the claim.").

AAI Corp. v. United States, 22 Cl. Ct. 541, 544 (1991) (quoting *Kunz Constr. Co. v. United States*, 12 Cl. Ct. 74, 79 (1987) (emphasis in original)); *see also Johnson Controls World Services, Inc. v. United States*, 43 Fed. Cl. 589, 593 (1999). Yet, aside from what North Star knew and when, it remains that the claims at issue are not based upon the same set of operative facts, but, at best, similar occurrences during different time periods. Under these circumstances, the enlarged claim doctrine avails plaintiff naught, as the decisional law so reflects.[33]

Reflecting the foregoing, the court's specific jurisdictional findings are summarized in the attached Fact Appendix I, which lists the relevant paragraphs of the various complaints raising certain claims, the document(s) that plaintiff purports represent a CDA claim, and various findings regarding those documents. These findings reveal that, while the total number of claims that remain jurisdictionally viable is much reduced over those that originally went to trial, the most significant of

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[33] *See, e.g., Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099, 1110-12 (D.N.M. 2006) (contract disputes in different fiscal years "did not involve the same operative facts"); *Johnson Controls World Services, Inc. v. United States*, 43 Fed. Cl. 589, 595 (1999) (claims involved facts that though similar, were "sufficiently distinct" to preclude application of doctrine); *ECC Int'l Corp. v. United States*, 43 Fed. Cl. 359, 367 n. 6 (1999) (doctrine inapplicable where plaintiff "relies on facts ... that were never presented to the contracting officer and never addressed in a final decision"); *compare Modeer v. United States*, 68 Fed. Cl. 131, 137 (2005), *aff'd*, 183 Fed. Appx. 975 (Fed. Cir. 2006) (enlarged claim doctrine applicable to cover rent for entire period of government holdover tenancy even though contractor's claim was only for the first month of the holdover period).

the claims here are unaffected. That is true, in part, because many of the latter claims seek only declarations -relief that, as noted, does not require a prior request for a sum certain. *See Clearwater Constrs.*, 56 Fed. Cl. at 309, 311; *see also CW Gov't Travel,* 63 Fed. Cl. at 381-82. Indeed, most of the substantive issues raised are implicated by plaintiff's banner claim-that defendant acted in bad faith, a topic to which the court now turns.

B. Bad Faith

"The need for mutual fair dealing," the Federal Circuit has instructed, "is no less required in contracts to which the government is a party, than in any other commercial arrangement." *Maxima Corp. v. United States,* 847 F.2d 1549, 1556 (Fed. Cir. 1988); *see also St. Regis Paper Co. v. United States,* 368 U.S. 208, 229 (1961) (Black J., dissenting) ("It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."). Most of plaintiff's claims may be viewed as a variation on a theme-that the government officials involved here, in sundry ways, acted in bad faith. Accordingly, while various of plaintiff's allegations could be viewed as asserting breaches independent of its bad faith claims, the court believes that the evidence of animus here is such that it is more appropriate to view all those allegations as being at least potentially impacted by the government's bad faith.

1. Standard of Proof

Because it is an implied term of every contract that each party will act in good faith towards the other, a party may breach a contract by acting in bad faith. *Link v. Dept. of the Treasury,* 51 F.3d 1577, 1582 (Fed. Cir. 1995); *see also Centex Corp. v. United States,* 395 F.3d 1283, 1304 (Fed. Cir. 2005). As an aspect of these duties, "[e]very contract ... imposes an implied obligation 'that neither party will do anything that will hinder or delay the other party in performance of the contract.'" *Essex Electro Eng'rs, Inc. v. Danzig,* 224 F.3d 1283, 1291 (Fed. Cir. 2000) (quoting *Luria Bros. v. United States,* 177 Ct. Cl. 676, 369 F.2d 701, 708 (1966)); *see also H & S Mfg., Inc. v. United States,* 66 Fed. Cl. 301, 310 (2005), *aff'd* 192 Fed. Appx. 965 (Fed. Cir. 2006) . Such covenants require each party "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp.,* 395 F.3d at 1304; *see also Malone v. United States,* 849 F.2d 1441, 1445 (Fed. Cir. 1988), *modified on other grounds by,* 857 F.2d 787 (Fed. Cir. 1988). This "duty not to hinder is breached when the Government commits 'actions that unreasonably cause delay or hindrance to contract performance.'" *H & S Mfg.,* 66 Fed. Cl. at 311 (quoting *C. Sanchez & Son, Inc. v. United States,* 6 F.3d 1539, 1542 (Fed. Cir. 1993)). Such a breach occurs when, in the words of Judge Posner, there has been "sharp dealing," defined as taking "deliberate advantage of an oversight by your contract partner concerning his rights under the contract." *Mkt. St. Assocs. L.P. v. Frey,* 941 F.2d 588, 594 (7th Cir. 1991); *see also Centex Corp.,* 395 F.3d at 1304 (The covenant "include[s] the duty not to

interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.").

When a contractor alleges bad faith, in order "to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable." *Info. Tech. & Applications Corp. v. United States,* 316 F.3d 1312, 1323 n. 2 (Fed. Cir. 2003). Translated into more common parlance, "well nigh irrefragable proof" has been described as "clear and convincing evidence." *Am-Pro Protective Agency, Inc. v. United States,* 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). "In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some ***specific intent to injure the plaintiff.***" *Torncello v. United States,* 231 Ct. Cl. 20, 681 F.2d 756, 770 (1982) (emphasis in original); *see also Galen Med. Associates, Inc. v. United States,* 369 F.3d 1324, 1330 (Fed. Cir. 2004); *Librach v. United States,* 147 Ct. Cl. 605, 614 (1959); *cf. Tecom, Inc. v. United States,* 66 Fed. Cl. 736, 757-72 (2005). Courts have found bad faith when confronted by a course of government conduct that was "designedly oppressive," *Struck Const. Co. v. United States,* 96 Ct. Cl. 186, 222, 1942 WL 4411 (1942), or that "initiated a conspiracy" to "get rid" of a contractor, *Knotts v. United States,* 128 Ct. Cl. 489, 121 F.Supp. 630, 636 (1954). *See also C. Sanchez & Son, Inc.,* 6 F.3d at 1542. As these cases illustrate, the "irrefragable proof" standard, though daunting, is not intended to be impenetrable, that is, it does not "insulate government action from ***any*** review by courts." *The Libertatia Assocs., Inc. v. United States,* 46 Fed. Cl. 702, 707 (2000) (emphasis in original); *see also L.P.*

Consulting Group, Inc. v. United States, 66 Fed. Cl. 238, 243 (2005); *Manson Const. Co. v. United States*, 64 Fed. Cl. 746, 753 n. 11 (2005).[34]

Perhaps sensing weaknesses in its case, defendant attempts to fasten a layer of legal kevlar onto the "bad faith" standard that truly would make it impregnable. It contends, for example, that there can be no bad faith unless it is shown that a breach of an express contract provision has occurred. To be sure, the implied covenant of good faith and fair dealing cannot be used to expand or override contractual duties in the express contract. *See, e.g., Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998); *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639,

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[34] In *Tecom*, 66 Fed. Cl. at 771, this court held that "[t]he presumption of good faith conduct of government officials has no relevance" in considering "claims that the duties to cooperate and not hinder performance of a contract have been breached." It further held that in such circumstances, proof of a violation need not be by clear and convincing evidence. *Id.* at 769. It is unclear whether *Tecom* may be squared either with Federal Circuit precedent or the jurisprudential underpinnings of the doctrine, in which performing in good faith and bad faith are often viewed as mutually exclusive. *See, e.g.*, Richard A. Lord, 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2002) ("It is axiomatic that before a court will consider a claim that the implied duty of good faith has been violated, there must be some factual basis for ... bad faith on the part of the defendant."); Robert S. Summers, *The General Duty of Good Faith-Its Recognition and Conceptualization*, 67 CORNELL L.REV. 810, 819 (1982) (the "good faith" standard "functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith"). Whatever may be the larger fate of the *Tecom* approach, this court finds it unnecessary to explore its application here for, as will be seen, plaintiff prevails under even the more rigorous standard, which requires a clear showing of animus.

648 (2005). But, it does not follow, *a fortiori,* that the covenant must be deemed fulfilled unless the express terms of the contract are breached. Rather, the covenant may be breached if, in ways unenvisioned by the contract, a party proceeds in a fashion calculated to frustrate or hinder performance by its contracting partner. Such was the holding in *Centex Corp.,* 395 F.3d at 1306, in which the Federal Circuit found that the covenant could be violated by a hindering action, provided the plaintiff was not seeking "an expansion of the government's duties under the contract or for a duty that is inconsistent with some provision of the contract."[35] In other words, the covenant may be breached if the contract is enforced in a fashion designed to "interfer[e] with the plaintiffs' enjoyment of the benefits contemplated by the contract, which is among the core functions served by the implied covenant of good faith and fair dealing." *Centex Corp.,* 395 F.3d at 1306. Indeed, the covenant perhaps plays its most crucial role where one party under a contract exercises discretion in favor of the other-"[t]he office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of the rule." *Mkt. St.*

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[35] *See also United States v. Basin Elec. Power Coop.,* 248 F.3d 781, 796 (8th Cir. 2001), *cert. denied,* 534 U.S. 1115 (2002) ("[s]ince good faith is merely a way of effectuating the parties' intent in unforseen circumstances, the implied covenant has 'nothing to do with the enforcement of terms actually negotiated'"); *Craig-Buff Ltd. P'ship v. United States,* 69 Fed. Cl. 382, 388 (2006) ("a claim for a breach of the implied covenant of good faith and fair dealing is not limited to specific contract terms").

Assocs., 941 F.2d at 595.[36] To hold that, absent a separate breach, the covenant is not violated would be to deprive this implied promise of any vitality in the particular universe for which it was designed-that of contract discretion-indeed, stripping it of any real significance in terms either of the expectations of performance or the remedies available for nonperformance.

Nor is defendant correct in asserting, *in fine*, that plaintiff must show that each action harmful to North Star was independently animated by animus. Such a standard would require neither "well nigh" nor

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[36] This conclusion is reinforced by the Restatement (Second) of Contracts, which describes the good faith requirement in circumstantial terms that do not track the specific terms of any given contract-

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But, the obligation goes further: bad faith may be overt or may consist of inaction.... A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts § 205 comment d. (1981); *see also* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and GAP-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L.REV. 559, 564-571 (2006) (tracing the origins of the doctrine); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L.REV. 369, 378-94 (1980) (emphasizing the role of the covenant where there is "discretion in performance").

"irrefragable" proof, but, rather, "downright impossible" proof. The artificial rigor it would introduce would require a plaintiff to establish a nexus between an expression of animus and each of perhaps dozens of actions taken over an extended period of time. In other words, plaintiff would need to produce not one "smoking gun," but an arsenal of them-each distinctly tethered to a particular harmful action. If nothing else, this approach would hamstring the court, preventing it from viewing a continuing course of varied conduct as itself objective indication that the actor had ill intent. It would also make it exceedingly difficult to find bad faith where a group of actors is involved, only some of whom directly exhibited animus. Perhaps for these reasons, the specific matching sought by defendant not only finds utterly no support in the decisional law,[37] but clashes decidedly with the approach taken by the Court of Claims in *Struck*. There, the court stated that "[i]f the aggregate of the actions of all of the agents would, if all done by one individual, fall below the standard of good faith, [the government] for

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[37] A review of cases that have made or sustained "bad faith" findings reveals no such analysis. *See Struck*, 96 Ct. Cl. at 222 (finding a lack of good faith in the context of overall government conduct that was "designedly oppressive"); *Hubbard v. United States*, 52 Fed. Cl. 192, 196 (2002) (finding bad faith based upon evidence indicating hostility and intent to injure contractor); *Libertatia*, 46 Fed. Cl. at 707-12 (finding, in general, bad faith on the part of the contracting officer representative and other government employees while concluding that the government's termination for default should be converted to a termination for convenience); *see also Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002); *Knotts*, 121 F.Supp. at 636.

whom the various agents acted should be held to have violated that standard." 96 Ct. Cl. at 221; *see also Libertatia,* 46 Fed. Cl. at 710. The law thus proceeds from the eminently logical conclusion that if evidence clearly and convincingly demonstrates a pattern of animus on the part of particular individuals, unreasonable actions taken by those same individuals were actuated by that enmity.[38] To hold otherwise would be to render the "good faith" rule a hollow maxim.

Truth be told, however, the foregoing discussion is more academic than dispositive for, as will be seen, this is not a close case. The bad faith here was pervasive and, over time, metastasized, spreading through and corrupting virtually the entire relationship between plaintiff and defendant. As will be seen, that bad faith plainly animated actions by key government officials that effectuated not only a breach of the covenant of good faith and fair dealing, but also many express contract provisions. To a discussion of these finer points, the court now proceeds.

2. Did Defendant Act in Bad Faith?

The dispositive issue here then is whether defendant's representatives acted, with animus, in a

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[38] Tellingly, at closing argument, defendant's counsel admitted that if the animus in question were based upon racism, a plaintiff would not need to show that every action taken against it was animated by that discrimination. Yet, conceding that certain forms of discrimination are more invidious than others, defendant's counsel could not explain why the proof demands of his rule would differ, depending on the underlying nature of the bad faith exercised in a given case.

fashion calculated to hinder plaintiff's performance. If they did, this would be the type of opportunistic behavior in an ongoing contractual relationship that would violate the duty of good faith performance. And, defendant's representatives-particularly, Mr. Peterson and Ms. Kiser-did precisely that.

a. Specific Statements Evidencing Animus-"Just follow the Miami Hurricane's Game Plan"

A specific intent to injure may be exhibited by the express statements of key government officials. *See, e.g., Libertatia,* 46 Fed. Cl. at 706-09; *see also* Artie McConnell, *Bad Faith as a Limitation on Terminations for Convenience: As Bad as They Say, or Not so Bad?*, 32 PUB. CONT. L.J. 411, 416 (2003) ("extraordinary and outspoken distaste on the part of the Government clearly demonstrates the intent to injure necessary to support a finding of bad faith"). The record here is littered with statements made by key government officials exhibiting animus toward North Star.

As noted at the very outset of this opinion, Mr. Peterson, then Chief of Housing for Alaska, sent an e-mail to most of the government officials involved in supervising the Birchwood contract, in which he colorfully summed up his view of how to administer the Lease. What he wrote bears repeating:

> Just follow the Miami Hurricane's Game Plan. Blitz Fisher [sic] the first time he takes the handoff from Wartes. Force them to go for the short gains. Keep them out of the red zone. On offense, exercise good ball control

> and mix up the plays to throw off their timing. Try to draw them offsides and into a penalty situation. And always remember that you have home field advantage.

Such statements, unfortunately, were neither isolated in number nor unusual in tenor. Thus, in October of 1997, when the hostilities between the parties were in their nascent stage, Col. Brown set the tone for his subordinates when, in rejecting Mr. Fischer's position on carpet depreciation, he stated at a meeting, "[w]e'll just let your lawyers and our lawyers deal with this, because I'm going to figure out a way that I can take it right out of your pay." Seemingly always embracing confrontation, rather than cooperation, Mr. Peterson, in July of 1998, complained that his employees were "floundering as to the best course of action for deducting rent" and "withdrawing work for accomplishment by an alternative source," clearly establishing these as independent goals to be achieved in the administration of the Lease. During this same period, he began to urge his colleagues to consider how the Army would replace North Star when the Lease terminated-even though that event could occur, at the earliest, nine years hence. Later, Mr. Peterson wrote an e-mail to Ms. Kiser in which he acerbically stated "I recommend installing a trap door in front of your desk which you can release when Eldon is standing on it in front of your desk. Connected to a chute to the Chena River." Shortly thereafter, when Mr. Wartes confronted Ms. Kiser about her manipulation of the schedule to North Star's detriment, she indicated that the reason she had done so was "because I can."

Defendant asserts that these statements represent merely the accumulated frustration of government officials who were dealing with a difficult situation. But, government employees who worked at Birchwood testified that Ms. Kiser and others acted in a calculated fashion to harm North Star. Thus, former housing inspector Yolanda Klumb, who worked at Birchwood for approximately two and one-half years, testified that Ms. Kiser often called Mr. Wartes a liar in her presence and at staff meetings. Ms. Klumb, however, testified that she did not believe that Wartes had ever lied to her and that he was a "very knowledgeable person" about maintenance. She concluded, rather, that it was Ms. Kiser who often bent the truth to her purposes. For example, Ms. Klumb believed that Ms. Kiser changed her inspection reports, so that items that should have been listed as "occupant damage" were instead reflected as "fair wear and tear." In this regard, she convincingly testified:

> I was authorized at inspections to make certain determinations, certain items that I can deem fair wear and tear.... And then I have heard her on numerous occasions saying, well, she's not going to pay that. Eldon's going to pay it, or I'm sorry, North Star is going to pay it completely. And I had already made the determination that something was supposed to be ... occupant damage as opposed to fair wear and tear.

Ms. Klumb further testified that Ms. Kiser's repeated attempts to shift the "brunt of whatever confrontation was going on" to Mr. Wartes were a "standing joke" in

the office. She admitted to Mr. Wartes, on another occasion, that Ms. Kiser was "out of control."[39]

Ms. Klumb's observations were buttressed by those of Nikisha Goins, another former housing inspector, who testified, via deposition, that she was "being used as a tool to make North Star pay for stuff." She elaborated that she was "being used to go out there to do the inspection, assess the damages, but bring ... less charges back to the government." She recalled being instructed by Ms. Kiser to reduce government spending on carpet and painting and cited several instances in which Ms. Kiser refused to authorize the replacement of items that, in her view, should have

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[39] At her deposition, she more bluntly indicated that Ms. Kiser was "screwing over" Mr. Wartes. At trial she indicated that the latter phrase might not have been "quite the right word for me to use," but, nonetheless, reemphasized that Ms. Kiser was not working with Mr. Wartes. At another point in her testimony, Ms. Klumb indicated:

> Q: Okay. And do you feel from your observations during your three years there that Mr. Wartes was treated unfairly?
>
> A: Yes, I do.
>
> Q: Okay. Can you tell us how?
>
> A: I believe that he tried to do his job when he-he tried to work things through trying to make things fair, but I don't think Connie Kiser worked with him quite the way she should have.... I think he did try to go that extra mile to help. He certainly helped me in many ways when I was lacking the knowledge....

Notably, Ms. Klumb's observations were corroborated by documents contemporaneously prepared by Mr. Wartes (*e.g.*, an August 1, 2003, e-mail to Mr. Fischer), which captured various comments she made criticizing Ms. Kiser.

been replaced at the government's expense. Ms. Kiser, in fact, reportedly encouraged Ms. Goins to think of Mr. Wartes as the "big bad wolf," leading Ms. Goins to conclude that many of Ms. Kiser's decisions about what to fix or pay for were based on her personal animosity toward Mr. Wartes and a desire to impact negatively North Star. As Ms. Goins stated, "Connie ... did not like Eldon and it seemed like she took that very personal in a lot of decisions she made on whether to fix things, or not fix them. It just became personal and I was being used to take her frustration out on him."[40] By comparison, Ms. Goins indicated that over time, she had no problems working with Mr. Wartes, whom she found cooperative. Ms. Goins, however, could not say the same of Ms. Kiser, whom she found uncooperative

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[40] Various statements made by Ms. Goins, consistent with her deposition testimony, were memorialized by Mr. Wartes in a June 27, 2002, e-mail to Mr. Fischer, in which Mr. Wartes indicated-

> Niki [Goins] also told me ... that she told Connie that if she ... was called to testify in court that she was going to have to tell the truth and she hoped Connie had a job after. She also said she is going to start making a copy of what she gives Connie because she believes (just like another inspector Yoli said last year) that Connie changes her paperwork after she turns it in to her. Niki admitted that there is no way we could know what the Government expects us to do because Connie will not let us see that paperwork the inspector fills out.

When asked at her deposition whether she had said such things, Ms. Goins answered affirmatively, adding that Ms. Kiser "could do whatever she wanted, how she wanted and when she wanted."

and, at times, coercive. Indeed, both Ms. Klumb and Ms. Goins were so distrustful of Ms. Kiser that they made duplicate copies of their inspection paperwork, fearful that Ms. Kiser was altering their reports to reflect occupant damage as fair wear and tear.

Of course, in her sworn testimony, Ms. Kiser denied that she held any animus whatsoever toward Mr. Wartes or North Star and emphasized repeatedly that her actions were prompted only by a sincere desire to administer Birchwood effectively. The record, however, demonstrates otherwise-and by clear and convincing evidence. For one thing, as noted above, Ms. Kiser's claims were flatly contradicted by not one, but two of her former employees-Ms. Klumb and Ms. Goins. Indeed, although hesitant and halting on the stand, Mr. Everett, the Contracting Officer Representative at Birchwood, ultimately could not deny that, in an apparent reference to Ms. Kiser and Mr. Peterson, he had told Mr. Wartes (in the presence of others) that "upper management" had "agendas" and was "set[ting] up [Northstar] for failure with how they are issuing units to you." In addition, during the trial, Ms. Kiser denied making statements that contemporaneous e-mails convince the court she made. For example, while Ms. Kiser denied ever saying that Mr. Peterson would ignore a contracting officer decision with which he disagreed, an e-mail prepared by Mr. Wartes and sent only to Mr. Fischer, dated April 22, 2000, stated-

> I told Connie we were going to have to ask for a Contracting Officer Decision on these matters, and she said "Fine, go ahead. If Tom Peterson doesn't agree with the Contracting

> Officer's decision, he won't abide with it anyway."

The record also reveals that Ms. Kiser was less than forthcoming with North Star. One particular incident stands out-she indicated in an April 20, 2001, memorandum to Mr. Wartes that she had ordered testing of a white powder found under carpet and that an outside laboratory had determined that it was, in part, residue from the pad breaking down. Yet, the actual laboratory reports, dated March 30, 2001, indicate nothing of the sort, but instead stated that the white powder was sodium sulfate and calcium carbonate. Ms. Kiser plainly knew this-in an internal e-mail dated April 23, 2001, she informed Mr. Peterson and others that "[a]ll we received was the letter saying that there were cleaning/drying agents in the white powder. Mae said someone told her that there was also residue from carpet backing breaking down but I don't have anything in writing on that." Yet, in an obvious attempt to mislead North Star, Ms. Kiser, on May 7, 2001, restated to Mr. Wartes that the white powder included deteriorated carpet backing. Based on the foregoing, as well as her demeanor at trial, the court finds that Ms. Kiser's self-serving testimony was evasive, incredible and, ultimately, unreliable.

Likewise, the court finds incredible the testimony offered by Mr. Peterson, whom the record suggests was most blameworthy in this matter. His testimony at trial was thoroughly contradicted by a variety of documents in the record. For example, he blithely testified that Mr. Everett was not required to support the Army's position if there was an ambiguity in the contract. Yet, in a February 9, 2001, e-mail, Mr.

Peterson sternly wrote that "[i]f there is lease ambiguity, our project manager's position should still be supported as completely and clearly as possible by Rod [Everett]." He denied ever telling Ms. Kiser that he believed that North Star was attempting to blackmail the government with respect to incentive fees, and then was presented with an e-mail in which he referred to that very allegation and asked that the message be kept "closehold." And while Mr. Peterson testified that his Miami football analogy was a "well-intentioned joke" directed to Col. Meeks, an alumnus of that university, he neither explained the provocative and detailed content of the message in those terms, nor why he sent this "inside" joke to six other individuals (including the contracting officer).[41] Also left unexplained were Mr. Peterson's many other sardonic quips, not to mention why, for that matter, he felt the urge repeatedly to "jest" about North Star and its staff to his superiors, subordinates and the contracting officers in the midst of so many heated contractual disputes.[42] In the court's view, based upon the record as a whole, Mr. Peterson's testimony had a decidedly hollow ring and is unworthy of reliance.[43]

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[41] The record reveals that this e-mail was sent in preparation for an evaluation meeting and in response to an e-mail sent by Col. Meeks in which the latter commented-"Looks like I am going to be sued just like everyone else."

[42] One is reminded of Samuel Johnson-"Of all the Griefs that harass the Distrest, [s]ure the most bitter is a scornful Jest."

[43] By comparison, the court found Mr. Wartes' testimony to be very reliable, particularly because it was repeatedly reinforced by written statements he made in contemporaneous

In sum, the record provides a virtual rancid cornucopia of electronic messages and other communications evidencing a specific intent by key government officials to injure North Star.

> b. Actions Taken Indicative of Bad Faith-"Force them to go for the short gains. On offense, exercise good ball control and mix up the plays to throw off their timing. Try to draw them offsides and into a penalty situation"

Bad faith may also be exhibited by conduct-both that which explicitly violates the contract and that which simply violates the covenant of good faith and fair dealing. *See Malone*, 849 F.2d at 1445; *L.P. Consulting Group*, 66 Fed. Cl. at 243; *see also Am-Pro Protective Agency, Inc.*, 281 F.3d at 1241; *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 288-89 (3d Cir. 2000).[44] Various cases

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e-mails and other documents. In important regards, his testimony was also corroborated by Ms. Klumb, Ms. Goins and Mr. Everett.

[44] In addition, the Restatement emphasizes that the obligation of good faith is "violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts." Restatement (Second) Contracts § 205, comment e (1981); *see also id.* at comment a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.").

hold that the government breaches the covenant of good faith and fair dealing where it interprets a contract in a way purposely designed to prevent the contractor from performing in a timely fashion. *See, e.g., Triax Co., Inc.*, 88-3 B.C.A. ¶ 20,830, 1988 WL 58843 (1988); *see also S & S Equip.*, 89-1 B.C.A. ¶ 21,469, 1988 WL 134138 (1988); John Cibinic, Jr., Ralph C. Nash, Jr. & James F. Nagle, Administration of Government Contracts 302 (4th ed.2006) (hereinafter Cibinic, Nash & Nagle). Here, the breaches of the Lease that occurred increasingly as the years progressed serve to reinforce the conclusion that the statements highlighted above were neither idle jokes nor venting, but rather windows into the minds of government officials who repeatedly effectuated their animus toward North Star in conduct.

For reasons that soon will become evident, it is useful, at the outset, to identify several interpretational guides that may assist the court in construing the Lease. First, as an overarching matter, the court, in interpreting a contract, seeks to "effectuate its spirit and purpose." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting *Arizona v. United States*, 216 Ct. Cl. 221, 575 F.2d 855, 863 (1978)); *see also Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002). Toward that end, contract interpretation "begins with the plain language of the agreement." *Gould*, 935 F.2d at 1274; *see also Northrop Grumman Corp. v. Goldin*, 136 F.3d 1479, 1483 (Fed. Cir. 1998); *Barseback Kraft AB v. United States*, 121 F.3d 1475, 1479 (Fed. Cir. 1997). "[A]n interpretation which gives a reasonable meaning to all parts," the law provides, "will be preferred to one which leaves a

portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona,* 575 F.2d at 863; *see also Fortec Constr. v. United States,* 760 F.2d 1288, 1292 (Fed. Cir. 1985); *Franconia Assocs. v. United States,* 61 Fed. Cl. 718, 729-30 (2004). "A contract is thus to be interpreted as a whole." *Northrop Grumman Corp.,* 136 F.3d at 1483. Under this approach, when the contract language is unambiguous, the court's inquiry is at an end. *Textron Defense Sys. v. Widnall,* 143 F.3d 1465, 1468 (Fed. Cir. 1998).

But what if a contract term is ambiguous? Of course, such an ambiguity does not exist simply because the parties disagree as to the meaning of a provision. *See Cmty. Heating & Plumbing Co., Inc. v. Kelso,* 987 F.2d 1575, 1578-79 (Fed. Cir. 1993); *Brunswick Corp. v. United States,* 951 F.2d 334, 337 (Fed. Cir. 1991). Rather, "[a] contract is ambiguous," the Federal Circuit has stated "if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language." *Cmty. Heating & Plumbing,* 987 F.2d at 1579; *see also Edward R. Marden Corp. v. United States,* 803 F.2d 701, 705 (Fed. Cir. 1986). In such instance, the court "may appropriately look to extrinsic evidence to aid in [its] interpretation of the contract." *Gardiner, Kamya & Assocs., P.C. v. Jackson,* 467 F.3d 1348, 1354 (Fed. Cir. 2006) (quoting *Metro. Area Transit, Inc. v. Nicholson,* 463 F.3d 1256, 1260 (Fed. Cir. 2006)); *see also Banknote Corp. of Am., Inc. v. United States,* 365 F.3d 1345, 1353 (Fed. Cir. 2004); *City of Tacoma, Dep't of Pub. Utils. v. United States,* 31 F.3d 1130, 1134 (Fed. Cir. 1994). Such parol evidence may include the

negotiating history of the contract, *see Gardiner*, 467 F.3d at 1354, or the course of performance, *see Metro. Area Transit*, 463 F.3d at 1260.[45]

Even where a contract is unambiguous, "a course of dealing can supply an enforceable term to a contract (or may even supplement or qualify that contract) provided the conduct which identifies the course of dealing can reasonably be construed as indicative of the parties' intentions-a reflection of their joint or ***common*** understanding." *Sperry Flight Sys. Div. of Sperry Rand Corp. v. United States*, 212 Ct. Cl. 329, 548 F.2d 915, 923 (1977) (emphasis in original); *see also L.P. Consulting Group*, 66 Fed. Cl. at 241. In determining whether the parties' conduct reflects such a joint or common understanding,

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[45] As the Restatement states-

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Restatement (Second) of Contracts § 202(4); *see also Metro. Area Transit*, 463 F.3d at 1260; *Macke Co. v. United States*, [199 Ct. Cl. 552,] 467 F.2d 1323, 1325 (Ct. Cl. 1972) ("how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself"). T he Federal Circuit has also looked to extrinsic evidence "to confirm that the parties intended for [a] term to have its plain and ordinary meaning." *Teg-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006); *see also Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc).

Gresham & Co. v. United States, 200 Ct. Cl. 97, 470 F.2d 542 (1972), instructs:

> When a party with knowledge or the means of knowledge of his rights and of the material facts does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to supposed that it is recognized, there is acquiescence....

Id. at 554-55 (quoting *Harvey Radio Labs., Inc. v. United States*, 126 Ct. Cl. 383, 115 F. Supp. 444, 449 (1953), *cert. denied*, 346 U.S. 937 (1954)); *see also Amtec Corp. v. United States*, 69 Fed. Cl. 79, 88 (2005); *United Computer Supplies, Inc. v. United States*, 43 Fed. Cl. 351, 357-58 (1999), aff'd, 230 F.3d 1382 (Fed. Cir. 2000). In short, "a contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead." *Gresham*, 470 F.2d at 554; *see also L.P. Consulting Group, Inc.*, 66 Fed. Cl. at 241; *Int'l Resource Recovery, Inc. v. United States*, 60 Fed. Cl. 428, 431-32 (2004).

The following segments summarize actions that occurred in the administration of the Lease, highlighting those that constitute breaches of the Lease and those that are, in addition (or instead), indicative of defendant's bad faith here.

(1) Actions that Increased Downtime

As the court's findings reveal, the Lease contains a series of notification and inspection protocols that are intended to provide North Star with sufficient advance notice of the work required to be performed during a change of occupancy so as to allow it to plan accordingly. These same provisions, of course, are intended to benefit the Army, which should have a major interest in minimizing the amount of time that a unit remains vacant, thereby facilitating the smooth transfers of service members and their families. Yet, despite what should have been a shared objective, the record clearly supports plaintiff's claim that certain Army officials took steps designed to unduly complicate and increase the cost of North Star's performance in handling changes of occupancy. These steps had the individual and cumulative effect of increasing downtime-the period for which a housing unit was vacant between changes of tenants-ultimately leading to rent reductions and other unnecessary costs being imposed against North Star.

Stockpiling Units for Same Day Release. For the first nine years of the Lease, the Army released units to North Star on a rolling basis, essentially when they came back from the cleaners. This changed in either late 1997 or early 1998, shortly after the disputes regarding refuse collection and carpet depreciation began to erupt. Then, as the record reveals, the Army began to release units in groupings of up to eight units, typically on Mondays. Although Ms. Goodrich suggested that this approach

was designed, in part, to assist North Star, neither she nor Mr. Peterson ever got that impression from North Star, which, *ab initio,* vigorously complained about this practice. In particular, the contractor made clear that releasing units in such large batches greatly complicated its scheduling of work crews, including flooring subcontractors. Mr. Everett, for one, recognized that the practice made it more difficult for North Star to meet the downtime requirements (but did nothing about it). Nonetheless, this practice continued until May of 2000, ceasing when the parties entered into their preliminary settlement agreement in this case. Not coincidentally, it was reinstated in January of 2002, shortly after the settlement collapsed, with the Army then generally issuing eight units per week split between Mondays and Fridays. Of course, it was in this same "post-settlement" period that Ms. Kiser and others began taking other steps that, by all appearances, were designed to increase downtime and generate rent reductions.

Defendant correctly asserts that nothing in the Lease limits how many units the Army may turn over to North Star during any given period of time. Nor does there appear to be the sort of course of dealings here that could give rise to an independent contractual limitation. Relying on various internal documents, as well as testimony by Ms. Goodrich and Ms. Kiser, defendant asserts that the practice was designed to ensure that the Army did not inadvertently release more than eight units during any 5-day work period, so as to trigger the additional downtime clause in the Lease. Questioning at trial, however, revealed this excuse to be a sham, as it became clear that the Army could have easily

addressed its concerns about downtime either by keeping track of how many units it had released during any given 5-day work period or by adopting a simple convention, such as releasing no more than two units per day for the first four work days of a given week.[46] Moreover, the record refutes defendant's claim that there were operational reasons for stockpiling-while the evidence reveals that some units remained vacant while soldiers contested determinations of occupant damage, there is neither

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[46] Indeed, at trial, the court was able to pose several hypotheticals to Ms. Kiser that she admitted would not have triggered the additional downtime the Army was purporting to avoid. In one passage, Ms. Kiser testified-

> Q: ... When you said that they were putting them on Mondays and Fridays to avoid, essentially, triggering the higher down times, are you really trying to say that you couldn't have figured out a way to have these be sort of spread out and still accomplish the same purpose?
>
> A: No, you could have. It would have taken a lot of time, because the process of scheduling-
>
> Q: Well, how about releasing them two a day? If you did two a day on Monday, Tuesday, Wednesday, Thursday and skipped Fridays, we figured out that works, doesn't it?
>
> A: Right.
>
> Q: That spreads them out, doesn't it?
>
> A: Right, but-
>
> Q: Would you ever have had a problem with calculating the eight over five days, if you would have done it just two at a time?
>
> A: No.

indication that this problem was pervasive nor that these disputes accounted for the Army's stockpiling. Indeed, these "operational difficulties" apparently vanished during the year and a half that the preliminary settlement in this case was in place, during which time the Army returned to the practice of releasing units on a rolling basis only to reappear suddenly once the settlement collapsed. The record thus supports a different conclusion-that Mr. Peterson and Ms. Kiser employed stockpiling over the period in question, not despite the fact that it caused North Star difficulties, but precisely ***because*** it did so. The latter objective is exemplified by Ms. Kiser's response to Mr. Wartes when he complained that Ms. Kiser had held a unit until right before lunch, thereby idling a large crew of North Star subcontractors. In testimony credited by the court and cited above, Mr. Wartes stated that he said- "Connie ... why are you doing this?" And she reportedly replied, "because I can."[47]

Other Actions. While stockpiling was the root of many of North Star's ills, it was not the only action taken by Army officials to complicate the turnover

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[47] Indeed, during the period that stockpiling was originally instituted, Mr. Peterson issued one of several e-mails in which he indicated that he was focused on "the best course of action for deducting rent, [and] withdrawing work for accomplishment by an alternate source." Moreover, there is certainly evidence that animus actuated the practice of stockpiling when it was reinstituted in 2002. Thus, in evidence credited by the court, Mr. Wartes indicated that in June 2002, Mr. Everett told him that "there is no doubt you are set up for failure with how they are issuing units to you" as "[t]here is no way you can do the work in the allotted time."

process-with an eye toward diminishing the Army's outlays at the expense of North Star and imposing liquidated damages on the latter. Among the other practices within this vein, which violated both the explicit terms of the Lease, as well as the covenant of good faith and fair dealing, were:

- **Failure to provide adequate notice.** Section D.7.(b)(1) of the maintenance annex provides that the Army will schedule a pre-termination and termination inspection after being advised by the occupant of an impending move and will notify North Star of the time of this inspection. The provision assures that "[t]he Government will make every effort to provide this notice 21 days in advance of the projected change of occupancy," but notes that "[b]ecause of short-time occupant orders or other extenuating circumstances, [North Star] can expect an average of 10-14 days advance notice." These notices are important as North Star is contractually obligated to attend the pre-termination inspections and has expressed a continuing desire to attend the termination inspections, which is its right under the Lease. Moreover, the importance of North Star being present at these inspections has increased concomitantly with the number of disputes that have arisen regarding its responsibility for various repairs and maintenance. The record, however, reveals numerous instances in which Army officials, particularly Ms. Kiser, did not make "every effort" to provide timely notice, but instead frequently rescheduled inspections at the

last moment and, in some instances, provided no notice whatsoever-both without any indication of good cause. Indeed, the record, as a whole, indicates that, at least in terms of Ms. Kiser, the delays and failures in giving notice were part of a calculated process designed to disrupt the change of occupancy, allow more costs to be assessed against North Star, and increase downtime with a view toward imposing rent reductions.[48]

- **Failure to provide work authorizations.** Section B.33. of the maintenance annex defines "Work Authorization" as "[a]n official document issued by the Government for the accomplishment of work by [North Star] and which is used to verify entitlement for reimbursement." Section C.2.(c)(10) of the annex indicates that the Army is responsible for "notify[ing] [North Star] via work authorizations of occupant-caused damages or conditions requiring correction or cleaning and reimbursing [North Star] for accomplishment of same;" section D.7. (b)(3) of the annex indicates that this requirement should be met "[s]ubsequent to the termination inspection." Defendant does not deny that, increasingly, over the period in question, the Army failed to provide necessary authorizations, thereby breaching the Lease.

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[48] Among other things, it is particularly notable that as the disputes among the parties multiplied, the situations significantly increased in which less than 10 days' notice was given of a unit's change of occupancy.

Rather, it asserts that the failure to issue the authorizations did not prevent North Star from performing needed work-suggesting that, even without an authorization, North Star should have repaired occupant damage within the downtime period specified by the Lease and then sought reimbursement later. But, this assertion misses the mark for three reasons: (i) the Lease, as well as the parties' continuing course of conduct in the first decade or so of the Lease, gave North Star the right to expect such authorizations on a timely basis and the Army's failure to provide them clearly delayed the turnover process;[49] (ii) this was one of a number of steps taken by Ms. Kiser that in combination delayed the turnover process; and (iii) this step was one of several taken by Ms. Kiser and others with a specific intent to harm North Star and to

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[49] The same can be said of North Star's claim that Army officials failed to provide a list of occupant damage after the pretermination inspection. This was plainly required by section D.7.(b)(2) of the maintenance annex which states, as to the pretermination inspection, that "[t]he Government will provide the occupant with a list of this work and associated costs for which the occupant is liable, as contained on the approved list of repair costs, and provide a copy to [North Star]." While defendant suggests that this provision did not specify whether the list had to be provided immediately at the end of the pretermination inspection, a review of the aforementioned text in context strongly intimates as much. Moreover, during the periods pertinent to this litigation, the Army repeatedly failed to provide North Star with such a list at all, making any timing claims moot. While defendant claims this breach was harmless, this court concludes otherwise, particularly viewing this breach in the context of the Army's overall conduct.

diminish, below good faith levels, the Army's expenditures on Birchwood.

- **Failure to grant additional time for extensive repair work.** North Star asserts that, under the Lease, it is entitled to additional time to correct major occupant damage to units. It cites, *inter alia*, section D.7.(a) of the maintenance annex, which refers to change of occupancy work as that which "includes any routine maintenance and repair." While North Star emphasizes the word "routine" in this provision, any notion that change of occupancy work is limited to what is "routine" is belied not only by the use of the word "includes" in this provision, but also by section D.7.(c) of the maintenance annex, which, in further describing "change of occupancy work," states that "[i]n the event the occupant fails to ... correct damages beyond normal wear and tear for which the occupant is responsible, it shall become [North Star's] responsibility to ... repair the unit for the next occupant ..."[50] Nonetheless, it appears that for the first ten or so years of the Lease, the Army, acting under what Mr. Everett described as a verbal agreement, allotted North Star

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[50] North Star notes that the maintenance annex has a separate category for "Scheduled Repair or Renovation Downtime," which is to be "completed on the basis of the actual number of days any specific unit has been turned over to [North Star] for such work," but it appears that this provision, section D.5.(b) of the maintenance annex, does not cover change of occupancy work.

additional days of downtime where carpet or vinyl needed to be replaced in a turned-over unit. In the court's view, this course of dealing evidenced a joint or common understanding that served to supplement or qualify the Lease, reasonably inducing North Star into believing that it would receive additional time for significant repair work. *See Sperry Flight Sys.*, 548 F.2d at 923. Accordingly, the Army's decision in late 1997 or early 1998 to abandon the practice of regularly providing extensions represented a breach of the parties' common understanding of how the Lease would be administered. And, as wielded with animus by Ms. Kiser, the failure to grant extensions for extensive repair work became yet another facet of the breach of the covenant of good faith and fair dealing.

Improper use of extra-contractual inspections. Contrary to plaintiff's claim, the Lease does not limit the Army's ability to conduct inspections of the units, but, instead, section C.2.(c)(16) of the maintenance annex allows the Army to "[i]nspect each phase, at the Government's discretion, of the services rendered under this annex during both [North Star's] work performance and after completion of the tasks." Nonetheless, this general right to inspect the units cannot be viewed as supplanting the detailed provisions in the Lease concerning the three-fold inspections that are to accompany changes of occupancy. As recognized by Mr. Everett in, *inter alia*, a November 1999 position

paper, the latter protocols were timed and designed to give North Star sufficient notice of the work required in a unit to allow it to complete the work and turn the unit back within the downtime specified by the Lease. Toward that end, the Lease gave North Star the right to attend those inspections. These detailed provisions in the Lease, and the protections they afford North Star, would be meaningless if the Army were permitted to identify work items after the termination inspections at "quality assurance" inspections that North Star did not attend.[51] Accordingly, the court finds that the use of such inspections in the fashion employed by Ms. Kiser and others violated the Lease. Moreover, based on the record as a whole, it finds that the adoption of this procedure by Ms. Kiser was actuated by her animus against North Star.

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[51] North Star also alleges that the Army repeatedly, and with intent to harm, rejected its work at the acceptance inspections. Section C.2.(a) of the maintenance annex plainly gives the Army "the right to refuse to accept the unit if the work has not been completed or performed satisfactorily or is otherwise not in accordance with the provisions of this annex." Nothing in this provision, however, gave the Army the right to conduct overzealous or arbitrary inspections. Yet, the record suggests that Ms. Kiser, in particular, did just that. Her pedantic overzealousness is perhaps evidenced best by having her staff inspect the paint in Unit 961 using a black light, so as to detect background stains invisible to the naked eye. Her arbitrariness also is evidenced by the various situations in which, as described by her inspectors, she changed their reports to favor the Army without so much as going to the unit involved.

Taken in combination with stockpiling, the court believes the aforementioned actions all contributed to increase unduly North Star's downtime.[52] Particularly given the intent underlying these actions, this course of conduct clearly constituted bad faith that breached the Army's duty to cooperate. *Compare Hoel-Steffen Constr. Co. v. United States*, 231 Ct. Cl. 128, 684 F.2d 843, 849-50 (1982) (unreasonable denials of approvals or delays in giving approvals called for by the contract are breaches of the duty of cooperation); *Appeal of Raytheon Serv. Co.*, 81-1 B.C.A. ¶ 15,002, 1981 WL 7359 (March 19, 1981); Cibinic, Nash & Nagle, *supra*, at 305-07.

(2) Downtime Calculations

Wholly apart from the actions designed to increase North Star's actual downtime, the record indicates that the Army's calculation of downtime violated the Lease in several regards.

Section D.5.(a) of the maintenance annex indicates that the "[t]he total number of downtime days for units vacant for purposes of change of occupancy maintenance shall not exceed the number of move-outs (excluding move-outs for purposes of scheduled

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[52] Fact Appendix II summarizes the courts findings as to particular units, highlighting where various of the issues described above were encountered. The findings reflected in the appendix are not comprehensive, in the sense of listing every single unit in which a particular violation occurred. Rather, these findings serve primarily to illustrate the breadth of the practices adopted by Ms. Kiser and others, focusing, in particular, on those units discussed at trial.

repairs or fires and acts of God) per month multiplied by 3 days." This same provision indicates that rent deductions may occur if North Star fails to "stay within prescribed downtime." Plaintiff argues that under this provision, downtime for a month is calculated on an aggregate basis-that is, the number of move-outs per month multiplied by three days-and that no reductions should occur if the actual downtime in a given month does not exceed this aggregate. Not so, defendant asserts, focusing on section D.7.(d)(1) of the maintenance annex, which states that "[a]ll change of occupancy work must be completed within three working days after the unit becomes available, which shall be determined from the date the unit is turned over to [North Star] by the Government for change of occupancy work."

At first blush, it would appear that the cited provisions contradict each other. However, plaintiff's interpretation of the Lease makes more sense for several reasons. First, treating downtime in the aggregate draws support from an example given in Section D.5.(a) regarding the application of both the three-and five-day rules (the latter being triggered if more than eight units are turned over to North Star within any five-day work period). That example states-

> For example, if there are 17 move-outs in a month, the total allowable downtime is 51 days. However, if 11 of these units were turned over to [North Star] within a 5-day work period, an additional 6 days will be allowed for a total of 57 days in allowable downtime (representing the additional 2 days for each of the units in excess of eight turned

over within a 5-day work period added to the 51 days allowed for 17 move-outs).

This example-particularly, the portion thereof explaining the 5-day rule-makes no sense if, as defendant asserts, North Star could be assessed a rent deduction if it took more than three days to turn back a given unit. Second, it should be noted that it is section D.5.(a), and not section D.7.(d)(1), which authorizes the rent reductions-accordingly, while the Lease makes explicit the possibility of reductions if the average for a month is exceeded, it does not make any similar provision where a unit is turned over in more than three days. Imposing a penalty in the latter situation thus would violate the normal canon that penalty provisions in contracts are to be strictly construed. *See, e.g., Priebe & Sons v. United States,* 332 U.S. 407 (1947); *see also* 11 Williston on Contracts § 32:9 (4th ed.1990); 14 Williston on Contracts § 42:3 (4th ed.1990). It also would clash with section H.1.(d) of the maintenance annex, which indicates that rent reduction should occur "[i]f the downtime in any one month for units vacant for purposes of change of occupancy work exceeds the allowable downtime ***for that month*** " and states that the latter figure shall be "established in accordance with clause D.5.(a)." (Emphasis added).[53]

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[53] To be sure, section H.1.(c) of the maintenance annex indicates that the government shall assess liquidated damages "[i]n the event [North Star] fails to complete change of occupancy maintenance work by the date identified by [North Star] as when the unit would be returned." However, unlike section H.1.(d), this provision neither cross-references section D.7.(d)(1), nor vice-versa. Indeed, if anything, the H. 1.(c) penalty provision supports North Star's claim that the Lease

Finally, in its pre-and post-trial briefs, defendant admits that the calculation of downtime employs averaging, a concession that the court views as tantamount to conceding that section D.7.(d)(1) does not authorize reductions in rent if a particular unit is not turned over within three days, but only if the aggregate downtime for a given month is exceeded.

The fact that defendant cannot mount a defense of the interpretation taken by Ms. Kiser and others in administering the Lease is, in this court's view, evidence that the interpretation was unreasonable and, in light of other evidence, was part of an overall plan to punish North Star financially. This conclusion is reinforced by another position taken by Ms. Kiser beginning in 2002, now conceded to be wrong by defendant-including weekends and holidays in the downtime calculations that eventually led to excessive charges being made against North Star. In this regard, section B.10. of the maintenance annex explicitly states that "[f]or purposes of this lease agreement, downtime is measured in working days, vice [sic] calendar days." Moreover, in its post-trial briefs, defendant also admits that the Army improperly included in its downtime calculations: (i) time that occurred when defendant was late in conducting the acceptance inspection; (ii) downtime that occurred in one month in the calculation of another month's excessive downtime;[54] (iii) portions

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draws a distinction between normal changes of occupancy and those that require extraordinary maintenance and repair.

[54] Defendant concedes that this violated section D.5.(a) of the maintenance annex, which states that "[t]he total number of downtime days for units vacant for purposes of change of

of days when the Army either released a unit in the afternoon or conducted the acceptance inspection in the afternoon; and (iv) periods corresponding to time that the Army had granted North Star to perform "excessive repairs." At least for the period from April through June of 2002, defendant admits that these various errors substantially overstated the liquidated damages that were assessed against North Star.[55]

Nonetheless, defendant contends that a "mere misinterpretation of lease provisions is not enough to demonstrate bad faith," citing *WRB Corp. v. United States,* 183 Ct. Cl. 409, 423-24 (1968); *see also Librach,* 147 Ct. Cl. at 614 (refusing to find bad faith where government conduct was "an honest mistake"). *WRB Corp.,* however, is instructive in distinguishing between "mere misinterpretations" of a contract and conduct that violates the covenant of good faith and fair dealing. In this regard, it provides the following survey of the law:

> [I]n *Roberts v. United States,* 174 Ct. Cl. 940, 357 F.2d 938 (1966), we held the Government in breach of contract because its inspector hindered the contractor's performance even though we did not find that a protest had been lodged with the contracting officer. But the inspector's conduct in *Roberts* involved

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occupancy maintenance shall not exceed the number of move-outs ... per month multiplied by 3 days."

[55] For example, in its post-trial brief, defendant states that "[a]pplying those calculation principles, the Government should have assessed North Star nine days of liquidated damages instead of 25 for April 2002 ..., and six and a half days instead of 24 days for June 2002."

> more than a mere directive based on a misrepresentation of a specification. Over a period of more than 15 months he engaged in continual "overzealous supervision" which seriously hampered the contractor's efforts to perform.... Similarly, in *Adams v. United States,* 175 Ct. Cl. 288, 358 F.2d 986 (1966), the contractor, despite his failure to appeal to the contracting officer, recovered losses ensuing from the "extremely rigid, unreasonable and arbitrary conduct" of an inspector "during a period of approximately 3 months" ..., conduct which included substantial deviations from the inspection plan issued by the contracting agency....

WRB Corp., 183 Ct. Cl. at 423. While, based on this passage, the court concluded that "[a] mere misinterpretation of a specification, by itself, is not enough" to breach the covenant of good faith and fair dealing, it also observed that "the [g]overnment cannot impede, hinder, or interfere with the contractor's work by an improper course of conduct." *Id.* at 424. Other cases are to similar effect. *See, e.g., H.W. Zweig Co. v. United States,* 92 Ct. Cl. 472, 481, 1941 WL 4597 (1941) (liquidated damages annulled where undue delay caused by improper inspections); *Neal & Co., Inc. v. United States,* 36 Fed. Cl. 600, 645 (1996), aff'd, 121 F.3d 683 (Fed. Cir. 1997); *In re Zundel Bros.,* 85-3 B.C.A. ¶ 18,451, 1985 WL 17004 (1985); *In re Randall H. Sharpe,* 79-1 B.C.A. ¶ 13,869, 1979 WL 2538 (1979); *see also H & S Mfg., Inc.,* 66 Fed. Cl. at 311-12 (discussing relevant cases). More than ample evidence reveals that the errors in

downtime calculation here were driven by the desire of certain Army officials to injure North Star.[56]

(3) Actions Otherwise Designed to Increase North Star's Costs

Plaintiff also asserts that Army officials took other actions to drive up North Star's costs, while minimizing government outlays. In particular, plaintiff raises the following allegations:

Depreciation. Plaintiff challenges defendant's 1997 decision to implement unilaterally a 10-year depreciation schedule and to adjust reimbursements for carpet damages due to occupant negligence to reflect the remaining useful life of the carpet.[57] Plaintiff also challenges similar decisions made by defendant to adopt a depreciation schedule with respect to other items, such as counter tops and vinyl. Plaintiff claims that, on its face, defendant's use of depreciation schedules is inconsistent with section C.1.(s) of the maintenance annex, which expressly assigns to the Army the costs for repairing occupant-

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[56] Further indication of this may be drawn from the fact that, apparently unbeknownst to the contracting officer, Ms. Kiser, Mr. Everett and other Army officials steadfastly ignored multiple requests from North Star that they provide back-up documentation revealing how the allegedly excessive downtime had been calculated.

[57] For example, under this scheme, if occupant damage caused carpeting to be replaced five years after its installation, the Army would reimburse North Star only for 50 percent of the cost of the new carpeting; if a carpet was more than 10 years old when so damaged, no reimbursement would be provided.

caused damages beyond normal wear and tear. It further alleges, and has provided evidence to support this claim, that defendant's attempt to shift a portion of the cost of such repairs to plaintiff is inconsistent with the course of dealings established by the parties prior to 1997.

In previously denying defendant's motion for summary judgment on this issue, the court distinguished cases such as *Missouri Baptist Hospital v. United States,* 213 Ct. Cl. 505, 555 F.2d 290 (1977) and *Dodge Street Building Corp. v. United States,* 169 Ct. Cl. 496, 341 F.2d 641, 644 (1965), which limited the recovery of repair costs to the diminution in fair market value attributable to the government's breach of a contract. These cases, this court noted, though generally establishing that lessors should not receive a windfall when damage occurs on rented property, did not deal with a situation where the issue of who should bear the cost of repairs or replacement is directly resolved by the contract. *North Star Alaska Housing Corp. v. United States,* No. 98-168C at 5-6 (Fed. Cl. July 3, 2002); *see also Vinoy Park Hotel Co. v. United States,* 125 Ct. Cl. 336, 338-39 (1953).

In asserting to the contrary, defendant relied upon an unpublished decision in *WDC West Carthage Assocs. v. United States,* No. 00-622C (Fed. Cl. May 30, 2002), in which, on remarkably similar facts, a judge of this court concluded that *Missouri Baptist* required incorporation of a depreciation adjustment when calculating the lessee's liability for "cost of repairs" associated with occupant damage to carpeting. This court, however, rejected the reasoning in *WDC West Carthage,* noting that it relied upon a state court decision that represented a

minority view as to how reimbursement for damaged carpeting should be calculated.[58] Subsequently, the Federal Circuit reversed the lower court's opinion in *WDC West Carthage*, concluding, as this court had previously, that the *Missouri Baptist* line of decisions was inapposite. *WDC West Carthage Assocs. v. United States*, 324 F.3d 1359, 1362-63 (Fed. Cir. 2003). In this regard, the Federal Circuit stated-

> We disagree with the Court of Federal Claims that the result in these cases governs the instant appeal. There was no dispute in these cases that a breach of contract had occurred and thus the sole issue in each case was the amount of damages to which the landlord was entitled due to the tenant's breach. These cases therefore determined the amount of damages for which a tenant is responsible when he or she breaches a contract by damaging leased property and by failing, upon termination of a lease, to return leased property in the condition that existed at the outset of the lease. Thus, in marked contrast to the instant case, the cases relied upon by

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[58] *Compare, e.g., Abernethy v. Cates*, 182 Ga.App. 456, 356 S.E.2d 62, 65 (1987) (tenant's action resulted in such extensive injuries that replacement of the property was required and, therefore, mitigation of costs by accounting for depreciation was not appropriate); *Holloway v. Liberty Mut. Fire Ins. Co.*, 290 So.2d 791, 794-95 (La.App.1974) (court refused to read depreciation reduction into insurance contract that promised to "restore damaged property to its original condition"); *Bunde v. Badger Carpet Dyers, Inc.*, 262 Wis. 621, 55 N.W.2d 869, 870 (1952) (proper measure of damages was not the cost of reproducing property less depreciation).

> the Court of Federal Claims were not concerned with interpreting contract language, and certainly did not construe the lease language the cost of such repairs at issue here. They are, therefore, not relevant to the issue presented in this case, which necessitates interpreting that language.

Id. The court concluded, instead, that the case presented an issue of contract interpretation and, relying on provisions analogous to those in the Lease, concluded that the government was responsible for the full cost of replacing damaged carpeting without depreciation. *Id.* at 1363-64; *see also* Cases and Recent Development, 13 Fed. Circuit B.J. 146, 147 (2003) (*WDC West Carthage* "illustrates that depreciation value is not automatically assumed in contracts involving the government as a party.").

In light of the Federal Circuit's decision, defendant again mounts no serious opposition (apart from jurisdictional points) to plaintiff's claims regarding depreciation. And, for good cause-as in *WDC West Carthage,* the denial of any depreciation here is consistent not only with the Lease language, but also with the parties' conduct for the first nine years of the Lease. *See WDC West Carthage,* 324 F.3d at 1363 ("We also note the parties' past conduct in upholding Carthage Associates' interpretation of the subject leases."). Moreover, the rationale espoused in the Federal Circuit's decision plainly extends to all of the replaced items on which defendant took depreciation here, none of which was authorized by the Lease.

Defendant asserts that the lower court's ruling in *WDC West Carthage* indicates that the Army's interpretation of the Lease was, at most, a "mere

misinterpretation." The record, however, suggests that some of the officials who effectuated this interpretation of the Lease were prompted by a desire to reduce arbitrarily the Army's expenditures. Indeed, it cannot be overlooked that carpet depreciation was unilaterally adopted by the Army on July 9, 1997, in the midst of various disputes, including over refuse collection. Several months after this policy was announced, Col. Brown lectured Mr. Fischer on this point at an evaluation meeting held on October 15, 1997, at which he stated-"if you don't want to deal with us on this, then what I'm going to do is I'm going to get with the lawyers and we're going to come up [with] a depreciated schedule and then I will-we will figure out some way to deduct that from your payments and then if you want to sue us, have at it," adding "I'm going to figure out a way that I can take it right out of your pay." Yet, while a close call, the court believes that there is not clear and convincing evidence that Col. Brown, Mr. Peterson and others were actuated by animus in initially adopting depreciation.

Over time, however, this practice took on new dimensions. Particularly as viewed through the prism of the many statements of animus in the record, it is clear that the use of depreciation clearly became yet another weapon by which Mr. Peterson, Ms. Kiser and others could effectuate their animus toward North Star. And this certainly was true by the time that these officials, responding to a July 3, 2002, ruling by this court shedding considerable doubt on the legality of the depreciation practice, extended depreciation to counter tops, vinyl and other types of materials installed in the units. Indeed, at this time, these officials took the view that while the Army was

liable for occupant damage only reduced by the impact of depreciation, North Star was responsible for replacing, at its expense, carpeting, vinyl and other materials that had to match the color of the materials replacing those that had been damaged. In the court's view, the combination of these various events, together with the statements made by key officials revealing animus, lead to the conclusion that the imposition of depreciation eventually came to violate the covenant of good faith and fair dealing.

Other Conduct. The latter conclusion-that depreciation eventually was applied in bad faith to increase North Star's costs-is reinforced by a host of other actions taken by Mr. Peterson, Ms. Kiser and others, during the same time period, to diminish North Star's profitability. In this regard, two practices stand out:

- **Failure to correct occupant damage.** First, during periods relevant to this suit, Ms. Kiser adopted the practice of failing to correct occupant damage, so that, according to Ms. Goins, it would be viewed, upon the next tenant change over, as normal wear and tear. This practice, of course, not only adversely affected North Star, but also the service members and their families who had to live in the unrepaired units. It also undoubtedly caused the tenants to view North Star in a dim light, perhaps explaining some of the survey results.

- **Repair list and invoices.** Second, Ms. Kiser unilaterally altered the process for preparing

> work authorizations. In this regard, the Lease required that the parties establish a List of Repair Costs that "will be subject to change annually or from time to time by mutual agreement of [North Star] and the [Army]," and required North Star, in the work authorizations, to be reimbursed at the rates established by this list. Instead, beginning in the spring of 2002, Ms. Kiser began unilaterally to remove items from the List of Repair Costs (flooring items, in particular) and then demanded invoices to support reimbursement of the individual delisted costs. The latter requirement is not found in the Lease, which, in section H.3. of the maintenance annex, only envisions that invoices will be provided on a monthly basis, covering more than one work authorization. Indeed, sections H.2. and H.3. of the annex emphasize the use of the approved list of repair costs, leading the court to conclude that the invoices to which these provisions refer are not at all the sort that Ms. Kiser required. This change in practice again imposed new burdens on North Star (particularly where a given item was purchased in bulk and North Star did not have a specific invoice covering the use of a portion of the bulk item in a particular unit) and necessarily delayed the turnover process, contributing again to what the Army would later characterize as excessive downtime.

In sum, it appears that Mr. Peterson, Ms. Kiser and others had a hidden agenda designed to require North Star to shoulder costs that were the Army's

responsibility and, in general, to complicate the turnover process. *Cf. Neal & Co.*, 36 Fed. Cl. at 631 (no finding of bad faith where "[agency] actions were not the product of a 'hidden agenda' designed to force [the contractor] to shoulder the costs that were actually the fault of the [agency]").

(4) Actions Designed to Reduce North Star's Compensation

The various actions described above eventually led the Army to assess liquidated damages against North Star in the form of reduced rents. They also paved the way for the Army to deny North Star incentive fees under the Lease. The court will deal with each of these matters *seriatim*.

Abatement of Rent. Section H.1.(c) of the maintenance annex provides that "[i]n the event [North Star] fails to complete change of occupancy maintenance work by the date identified by [North Star] as when the unit would be returned to the Government ... the Government shall assess liquidated damages based on the most current average daily rate of BAQ [basic allowance for quarters] plus VHA [variable housing allowance] plus average daily lease cost per unit for each calendar day subsequent to that date." Likewise, section H. 1.(d) of the maintenance annex provides that "[i]f the downtime in any one month for units vacant for purposes of change of occupancy work exceeds the allowable downtime for that month (established in accordance with clause D.5.(a) [of the maintenance annex]), the Government shall assess liquidated

damages based on the most current average daily rate of BAQ plus VHA plus average daily lease cost for each calendar day in excess of the allowable downtime." Beginning in 2002, the Army invoked these provisions in assessing liquidated damages against North Star.

In the court's view, these assessments cannot stand. The demonstrated intent to injure exhibited by Mr. Peterson, Ms. Kiser and others, together with the various actions taken by these officials and others at their behest to complicate and delay the turnover process, renders arbitrary and capricious essentially every downtime determination that was made as a predicate to asserting liquidated damages. Certainly, defendant has not shown that any of the downtime calculations, which Ms. Kiser refused to provide to North Star over extended periods of time, were unaffected by the host of bad faith breaches outlined above. Moreover, it appears that the contracting officer decisions upon which these assessments are based are themselves suspect, given the lack of independence exhibited by Mr. Hopson and the fact that neither he nor Mr. Everett bothered to check carefully Ms. Kiser's calculations.

Incentive fees. In addition to shelter and maintenance rent, Article VIII of the Lease provides that the Army, "at its option" may pay North Star an "incentive fee" of up to five percent of the maintenance rent for the period of time for which North Star's performance is found by the Army to "substantially exceed the established standards" of the Lease. It further provides that "[t]he amount of the incentive fee shall be determined by an Incentive Fee Board based upon the performance of [North

Star] in operating the Premises in accordance with its obligations."

Defendant strenuously asserts that the Lease contains no requirement that any incentive fee be awarded, thereby rendering the merits of the incentive fee decisions nonreviewable. The case that defendant cites for this proposition, *George Sollitt Constr. Co. v. United States,* 64 Fed. Cl. 229, 305 (2005), however, only states that such decisions are "not reviewable on the merits." That decision explicitly states that an agency fee decision may be set aside as arbitrary and capricious, drawing extensively on *Burnside-Ott Aviation Training Ctr. v. Dalton,* 107 F.3d 854 (Fed. Cir. 1997). In the latter case, the Federal Circuit explicitly indicated that award fee decisions could be reversed if "the discretion employed in making the decision is abused, for example, if the decision was arbitrary and capricious." *Id.* at 859-60; *see George Sollitt Const.,* 64 Fed. Cl. at 247 ("if the contract language supports a finding that unilateral discretion has been granted to the government to determine the amount of a performance award, this court is limited to reviewing whether the government's award decision was arbitrary or capricious").[59] Various cases, including *George Sollitt,* thus hold that a range of seemingly unilateral contracting decisions may be set aside if

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[59] *See also McCarthy Bros. Const. Co. v. Pierce,* 832 F.2d 463, 468 (8th Cir. 1987) (holding that where a contract affords a particular party the right to make a decision, the determinations "are only binding as long as the decisions ... are not in bad faith, the product of a gross mistake, or arbitrary or capricious").

agency officials considered factors that were not relevant, followed improper procedures, or otherwise acted arbitrarily. *See, e.g., NI Indus., Inc. v. United States,* 841 F.2d 1104, 1106 (Fed. Cir. 1988); *George Sollitt Constr.,* 64 Fed. Cl. at 247; *RCS Enterprises v. United States,* 53 Fed. Cl. 303, 309 (2002).[60] Nor does any case remotely suggest that this court is powerless to set aside such agency fee decisions if it is clearly shown that the officials who made them were biased. *See, e.g., RCS Enterprises,* 53 Fed. Cl. at 309 (plaintiff remains free to challenge whether the unilateral decision "was generally in accordance with the law and with other duties that the Government owed to

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[60] These considerations flow directly from the Supreme Court's definition of arbitrary and capricious review. Thus, in deciding whether a decision was arbitrary and capricious, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council Inc.,* 462 U.S. 87, 105 (1983). The Supreme Court burnished these twin requirements in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29 (1983), identifying four grounds upon which a holding of arbitrary and capricious agency action could be based:

> [I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43; *see also Reilly's Wholesale Produce v. United States,* 73 Fed. Cl. 705, 709 (2006).

the plaintiff, including the duty of good faith and fair dealing"); *see also* 23 Williston, *supra,* at § 63:22 ("even where a defendant is given absolute discretion, it must exercise that discretion in good faith").

Here, a host of factors lead to the conclusion that the fee decisions made for 1995 and years subsequent in suit must be set aside as arbitrary and capricious. First, beginning with the consideration of the fee for 1995, it appears that, at Mr. Peterson's instigation, the Incentive Fee Boards relied upon factors that were not relevant to the established performance standards of the Lease. In particular, it appears that the Board denied plaintiff incentive fees, in part, because North Star chose to dispute various interpretations of the Lease (*e.g.,* depreciation) and the 1995 settlement agreement (*e.g.,* refuse collection) under the dispute resolution clause. North Star thus was punished for exercising its rights under the Lease, something that was clearly inappropriate. Second, beginning with the consideration of the fee for 1997, the Army relied on resident surveys that were plainly envisioned and designed by Mr. Peterson as way of denying North Star incentive fees. These surveys, *inter alia,* highlighted various disputes that were occurring between the Army and North Star and left the false impression that virtually every maintenance deficiency at Birchwood was North Star's fault. In fact, as other Army employees corroborated, Mr. Peterson and Ms. Kiser took steps to minimize the Army's expenditures at Birchwood-for example, leaving unrepaired occupant damage-which undoubtedly affected the resident's rating of North Star. Accordingly, reliance on the unbalanced surveys as basis for determining the

incentive fees was, in light of the circumstances, arbitrary and capricious.

Finally, it should not be overlooked that during the period at suit, the process for determining fees was necessarily biased by the dominant roles played by Mr. Peterson and, eventually, Ms. Kiser, both of whom, it has been established, were motivated, in their actions, by considerable animus toward North Star. It is particularly ironic that during these years, Mr. Peterson preached to the other board members that they had an "ethical" responsibility not to provide North Star any award when, in fact, it was he who was performing in an unethical fashion. His handling of the fee issues, in which he later enlisted Ms. Kiser's support, constituted a breach of the covenant of good faith and fair dealing, requiring the decisions made through the defective process to be set aside.[61]

(5) Other Issues

Plaintiff has raised a host of other issues with respect to which the court rules, as follows:

Refuse Collection. On this count, plaintiff seeks a declaration of the current requirements for the frequency of refuse collection at Birchwood Estates.[62] Again, this is far from a new issue. North Star raised

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[61] Plaintiff asserts-and defendant does not deny-that the difference between the maximum incentive fee award amount and the actual inventive fees awarded by the Army to North Star through 2004 totals $513,041.

[62] On August 8, 2005, this court, in an *ad limine* order, ruled that plaintiff could not pursue damages as to this count.

questions relating to refuse collection in its 1993 complaint, but those issues involved who was responsible for providing this service, rather than the frequency thereof. In his summary judgment ruling, Judge Futey construed the contract and held that North Star, rather than the Army, was responsible for this task under the Lease and had to pay for the service. *See North Star Alaska*, 30 Fed. Cl. at 267-69. Subsequently, the parties settled the 1993 dispute, and allegedly resolved the refuse collection claim by agreeing that North Star would perform that service.

After the settlement, however, a dispute arose as to how often refuse had to be collected. Plaintiff argues that, prior to 1995, the Army provided refuse collection at Birchwood on a weekly basis and asserts that the 1995 settlement agreement incorporated that periodicity. It contends that when the Army later insisted that collection be done semi-weekly, it was required to incur additional costs beyond the requirements of the settlement, for which reimbursement is now owed. On two prior occasions, this court declined to grant summary judgment on this issue based on the need to consider evidence regarding the discussions and negotiations that led to the 1995 agreement. The trial in this matter provided the opportunity to do just that.

To be sure, the Lease plainly requires that refuse be collected twice weekly. It is undisputed, however, that prior to the 1995 settlement agreement, the Army contracted with the Fairbanks municipality to collect refuse only once weekly, albeit at curbside. Per the terms of the 1995 settlement agreement, North Star agreed "to assume full responsibility for refuse collection and disposal for the remainder of the

lease and any extensions of the lease." Plaintiff asserts that it agreed to collect refuse only weekly, relying heavily, for this purpose, on the testimony of its attorney, John S. Stewart, who negotiated the 1995 settlement. At trial, on direct examination, Mr. Stewart testified that he had discussed the frequency of collection issue and "some other issues" with Mr. Donald Kinner, the government's attorney, "somewhere between a half a dozen and ten times over a period of several months." Mr. Stewart indicated that he had told Mr. Kinner that he was authorized to settle only if North Star "would collect the garbage on the same frequency as the government had been collecting the garbage before we agreed to take over that responsibility," and that was "once a week." His testimony, however, was contradicted by Mr. Kinner, who testified that he viewed the frequency of refuse collection as being "spelled out in the contract." He emphatically indicated that he never agreed with Mr. Stewart that North Star would have to collect refuse only at the same frequency as the Army had been collecting it, stating "that would be completely contrary to the whole point of what I was doing," which was to ensure that the Army was not receiving "anything less than the full refuse collection obligation that was spelled out in the contract"-the same one that had been upheld in Judge Futey's opinion.

Both parties attempt to buttress their cases with documentary evidence. Plaintiff, for example, points to a document that indicates that the Army "standard" for refuse collection in 1995 was weekly curbside pickup and points to a memorandum, issued by Ms. Goodrich following the settlement, which states that "[a]n out of court settlement was reached

to allow the contractor to decrease pick-up from twice a week to once a week." Defendant, however, contends that Ms. Goodrich was simply misinformed. For its part, it points to a draft letter from Mr. Kinner to Mr. Stewart, dated June 9, 1995, in which the former indicated that, as part of the proposed settlement, North Star agrees to "collect garbage from the 801 housing project twice each week." But, there is no definitive proof that the letter was ever sent.

Nonetheless, based upon the record, the court finds that the settlement agreement envisioned that North Star would collect refuse twice weekly. In this regard, the court views North Star's commitment "to assume full responsibility for refuse collection and disposal" as most likely a reference to the "responsibility" outlined in the Lease, rather than the Army's prior course of conduct. Had the parties intended to incorporate the Army's prior course, it is highly unlikely that they would not have spelled out in the settlement agreement what that prior conduct was. Such a definition, of course, was unnecessary if, as it appears, the settlement agreement simply reinstated the explicit requirements of the Lease. The court also credits this view of the agreement because, on this point, it finds the testimony of Mr. Kinner more credible than that of Mr. Stewart. In particular, there appears to be tension between Mr. Stewart's claim, on direct, that he discussed the frequency issue with Mr. Kinner between six and ten times, and his assertion, on cross-examination, that "there wasn't an issue between Mr. Kinner and me about the issue of frequency." While recollections may be faulty, both assertions cannot be true.

Accordingly, the court finds for defendant on this issue.

Authority to Order Disputed Work. North Star alleges that the housing project manager does not possess the authority to direct North Star to perform disputed work. Section C.2.(b) of the maintenance annex states that the housing project manager and her staff "will be responsible for the day-to-day administration of the Government's responsibilities with respect to this lease separate from lease administrative functions." This section further states that "the housing manager shall serve as the primary point of contract for matters involving the day-to-day coordination and administration of the Government's responsibilities." More specifically, the Lease indicates that "day-to-day administration" at the housing site includes the following tasks: (i) "[n]otify[ing] [North Star] via work authorization of occupant-caused damages or conditions requiring correction or cleaning and reimbursing [North Star] for accomplishment of same;" (ii) "[n]otify[ing] [North Star] of any maintenance or repair work required of which [North Star] may be unaware;" and (iii) "[g]iv[ing] [North Star] written notice of either noncompliance or unsatisfactory work on the part of [North Star]." These provisions, taken together with others in the Lease, lead the court to conclude that the housing manager may order North Star to perform disputed work. That conclusion is confirmed by the basic nature of government contracting under the FAR, in which government contracts, such as the Lease at issue, typically include a disputes clause that provides that "all disputes arising under or relating to the contract shall be resolved under this clause." FAR § 52.2331. Among the purposes of this

provision is to ensure the continuation of performance while disputes are being resolved. *See, e.g., Alliant Techsystems,* 178 F.3d at 1266; S. Rep. No. 95-1118, *supra,* at 32. Indeed, as is often the case in contracts that include the disputes clause, the Lease explicitly states this, indicating that "[p]ending final decision of a dispute hereunder, [North Star] shall proceed diligently with the performance of the contract."

In its post-trial briefs, plaintiff has abandoned this issue, perhaps recognizing the force of the plain meaning of the Lease provisions. That said, the court can well understand why North Star was hesitant to perform services directed by Ms. Kiser. In fact, in the court's view, the contracting officers, who plainly were aware of her animus and that of Mr. Peterson, were obliged to take steps to ensure that the administration of contract was unaffected. But, as will be discussed in greater detail below, they stood silent and, in that regard, themselves breached the covenant of good faith and fair dealing.

Possible Breaches as to Particular Units. Although several disputes with respect to individual units do not loom large in the context of North Star's monetary claims, the court, nonetheless, resolves those claims as follows:

- **Unit 884 (carpet matching).** North Star challenges a contracting officer's decision that it was financially responsible for replacing carpet in unit 884. North Star replaced occupant-damaged carpet in that unit with brown carpet, for which the Army paid. However, the Army

demanded that the blue carpeting in rooms adjacent to the recarpeted rooms be replaced with brown carpet by North Star at its expense. In this regard, the Army cited the portions of the maintenance annex that provide that "repaired areas shall be fully compatible with adjacent surfaces," that "[a]ll replacements shall match existing ... color," and that "replacement of carpeting shall be in kind." In the court's view, these provisions do not require North Star to replace carpeting in other rooms, simply because it has installed different-colored carpeting in rooms on the same floor owing to occupant damage. Moreover, if the Lease does require the replacement of all the carpeting on a given floor, then it seemingly also requires the Army to cover that cost where some of the carpeting is being replaced due to occupant damage. Indeed, such was the ruling of the contracting officer when faced with a similar situation involving counter tops. Accordingly, the court finds that the Army was responsible for the cost of replacing the carpeting in unit 884.

- **Units 633, 1090 and 1111 (vinyl replacement).** Section E.2.(b)(4) of the maintenance annex states that "[a]ll linoleum and/or resilient tile floor coverings shall be maintained free of cracks, chips, and torn or excessively worn material to provide floor coverings that are useable and have a pleasing appearance." While defendant would interpret this clause in absolute terms-that is, that a one-inch crack behind the toilet would require the

entire bathroom floor to be replaced at North Star's expense-a more reasonable construction suggests that minor cracks in areas not easily visible could be repaired by North Star, provided that the end result met the "pleasing appearance" requirement in section E of the maintenance annex, defined as "an appearance similar to the original finished appearance with only minor, nonobjectionable deterioration resulting from normal use." As to these three units, it appears, however, that the cracks were significant in size and obvious in their location. Moreover, plaintiff made no attempt to prove that the cracks and other damage that occurred with respect to this vinyl were the result of occupant damage. Accordingly, the court rejects plaintiff's claims as to this issue.

- **Unit 833 (carpet and vinyl replacement).** In this unit, the Army failed to correct previous occupant damage and, during a subsequent change of occupancy held North Star financially responsible for the replacement of carpet and vinyl. Specifically, the record reveals that the previous occupant had spilled bleach on the carpeting and vinyl-a fact that was noted by Mr. Everett when, upon a later turnover, he inspected the carpeting. While defendant claims that North Star was responsible because repairs to the carpeting and vinyl had failed or were insufficient, the record reveals that, due to occupant damage, the Army should have earlier covered the cost of replacing these same items. Accordingly, the Army, and not North Star,

should have been responsible for the cost when they eventually were replaced.

Unit 1029 (light fixture). On this point, North Star alleges that defendant owes it $81.80 for replacing a light fixture. The Lease provides, in section E of the maintenance annex, that "[a]ll replacements shall match existing ... material ... and design." On March 21, 2003, the Army issued a work authorization to replace an occupant-damaged light fixture in unit 1029 for a price of $107.69, based upon a quote for the fixture of $89. North Star, however, replaced the damaged fixture with one that was more expensive, asserting that it could not match the fixture that had been damaged. The Army refused to pay the additional cost for the upgraded fixture. In investigating the claim, Mr. Everett found that a light fixture like the one that was damaged was available at a local hardware store and the contracting officer, therefore, denied North Star's claim. Based upon the record, the court sustains that ruling.

Unit 638 (gutter down spout). The Army failed to issue an authorization for the replacement of a crushed and cracked gutter down spout, contending that the situation encountered was fair wear and tear. The record reveals-and defendant does not dispute-that the Army previously had treated crushed and cracked down spouts as occupant damage. Indeed, defendant offered no rebuttal to Mr.

Wartes' testimony that the gutter had been damaged by an occupant. Accordingly, the court finds that the Army is responsible for the cost of this replacement.

The court has reviewed North Star's remaining contentions that Army officials breached the Lease or the covenant of good faith and fair dealing, but has found either the legal reasoning or proof underlying these claims to be lacking.[63]

c. Abuse of the Dispute Resolution Process-"always remember that you have home field advantage"

Among the most troubling aspects of the case *sub judice* is clear proof that Mr. Peterson, Ms. Kiser and others eventually co-opted the contracting officer who was responsible for ruling on North Star's claims. Section 1.602-2 of the FAR provides that "[c]ontracting officers are responsible for ensuring

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[63] North Star did not prove, by clear and convincing evidence, that Army officials acted in bad faith in enforcing section E.8.(d) of the maintenance annex, which required that "[c]omplete interior painting will be accomplished at the first change of occupancy occurring subsequent to the 3rd, 6th, 9th, 12th, 15th, and 18th years of the lease agreement." While the court suspects that Ms. Kiser wielded this provision in a way designed to harm North Star, the evidence is simply to sketchy to conclude this. Moreover, unlike other instances, the record does not support a finding that the parties modified this provision of the Lease through a course of conduct. The court also finds plaintiff's proof lacking in terms of showing breaches as to the Army's assignment of temporary occupants to Birchwood and the Army's alleged failure to enforce housing rules at the development.

performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships." That same section emphasizes that contracting officers shall "[e]nsure that contractors receive impartial, fair, and equitable treatment." *Id.* at 1.602-2(b); *see also Wilner v. United States*, 24 F.3d 1397, 1412 (Fed. Cir. 1994) ("Contracting officers are required to be unbiased, impartial arbiters of contractor disputes.") (Bennet, J., dissenting). Indeed, the Federal Circuit has suggested that the latter regulation obliges the contracting officer to avoid even the appearance of impropriety. *See NKF Engineering, Inc. v. United States*, 805 F.2d 372, 377 (Fed. Cir. 1986) (indicating that the contracting officer has an obligation to act when he "perceives a strong appearance of impropriety in a situation not precisely covered by the [Ethics in Government Act].").

Maintaining impartiality, of course, does not prevent a contracting officer from consulting with other government officials. Indeed, FAR § 33.211 instructs the officer to "[s]ecure assistance from legal and other advisors" and to "[c]oordinate with the contract administration office or contracting office, as appropriate." *See also Hardwick, Inc. v. United States*, 1997 WL 410475 at *6 (Fed. Cl. July 21, 1997). As this regulation suggests, there is "no implied prohibition against [the contracting officer] first obtaining or even agreeing with the views of others." *Pacific Architects & Eng'rs, Inc. v. United States*, 203 Ct. Cl. 499, 491 F.2d 734, 744 (1974); *see also J.A. Terteling & Sons, Inc. v. United States*, 182 Ct. Cl. 691, 390 F.2d 926, 927 (1968); *Jacob Schlesinger, Inc. v. United States*, 94 Ct. Cl. 289, 307

(1941). Consultation is one thing, however; abdication, quite another. Hence, a contracting officer still must "'put his own mind to the problems and render his own decisions,'" *Pacific Architects*, 491 F.2d at 744 (quoting *New York Shipbuilding Corp. v. United States*, 180 Ct. Cl. 446, 385 F.2d 427, 435 (1967)), "tak[ing] ownership of all determinations included in the final contracting officer's opinion," *CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 479 (2005).[64] Accordingly, in consulting with others, a contracting officer may not forsake his duties, but rather must ensure that his decisions are the product of his personal and independent judgment. *Id.* at 479-80 (indicating that a contracting officer violated this duty where there was "a pattern of releasing authority to subordinates and remaining remarkably detached from the decision-making process").[65] Only

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[64] By way of fuller explanation, the Court of Claims stated in *New York Shipbuilding*-

> Nor can we agree that insistence on a decision by the contractual official is hypertechnical or unrealistic. It may be that, in some instances, the "reality" is that the designated individual merely rubber-stamps a subordinate's or superior's findings, but we must presume that the parties intend otherwise that they desire that in the end he put his own mind to the problems and render his own decisions. That has been the consistent teaching of this court in the past ... and we shall not today sanction an erosion of responsibility by holding that it makes no difference whether or not the chosen officer does his work.

New York Shipbuilding, 385 F.2d at 435.

[65] *See also Goltra v. United States*, 91 Ct. Cl. 42, 71-72, 1940 WL 4064 (1940), *aff'd as modified by*, 312 U.S. 203 (1941); *Boeing Co. v. United States*, 75 Fed. Cl. 34, 46-47 (2007);

in exercising that judgment can the contracting officer hope to fulfill his personal obligation to "[e]nsure that contractors receive impartial, fair, and equitable treatment." 48 C.F.R. § 1.602-2(b).[66] Conversely, abdication of those responsibilities in the face of pressure from government officials who plainly are driven by animus against a given contractor constitutes perhaps the most pernicious form of bad faith on the part of the government, as it threatens the integrity of a dispute resolution process that is central to the government contracting system itself.[67]

The record clearly demonstrates that such an abdication eventually occurred here. Early on during

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Lavezzo v. United States, 74 Fed. Cl. 502, 508-09 (2006) *Impresa Construzioni Geom. Domenico Garufi v. United States*, 52 Fed. Cl. 421, 427 (2002); Cibinic, Nash & Nagle, *supra*, at 1306.

[66] Indeed, the various boards have repeatedly emphasized the importance "to the disputes process that even the appearance of coercion be avoided" and that it is "vital to the process to restrain even the subtle influence of superiors." *In re Edmund Leising Bldg. Contractor, Inc.*, 81-1 B.C.A. ¶ 14,925, 1981 WL 6907 (1981); *see also In re Indus. Refrigeration Serv. Corp.*, 87-3 B.C.A. ¶ 19,976, 1987 WL 46597 (1987); *In re Byrd Foods, Inc.*, 83-1 B.C.A. ¶ 16,313, 1983 WL 14973 (1983).

[67] Although no decision holds this, various cases emphasize that the integrity of the dispute resolution process should not be undercut by influence and meddling. *See Goltra*, 91 Ct. Cl. at 71-72 (chief of engineers did not exercise his own judgment where he was coerced by a superior; contractor was entitled to an "uninfluenced decision"); *Lavezzo*, 74 Fed. Cl. at 503-04; *SIPCO Servs. & Marine Inc. v. United States*, 41 Fed. Cl. 196, 220-21 (1998) (where a contracting officer "fail[s] to exercise his own independent judgment due to improper influence from another party, 'it would represent an abdication rather than an exercise of his discretion'").

the period in question, Mr. Peterson attempted to bend the dispute resolution process to his will. On July 13, 1998, for example, he wrote Mr. Klein, then the contracting officer, indicating that "[w]e expect your support" in making rental deductions. To his credit, Mr. Klein resisted these demands, retorting that Mr. Peterson should "[p]lease refrain from directing the Contracting Officer." This response prompted Mr. Peterson, in a July 15, 1998, internal memorandum, to complain that there were "disturbing issues" regarding the "quality of the coordination and support which we feel that we are entitled to receive," adding that his office needed "a strong, aggressive proponent" and "may not find it" in the contracting officer. On July 20, 1998, Mr. Peterson directly responded to Mr. Klein, stating that the latter's July 14 e-mail "seems to be giving us poor legal advice" and that instead there should be a "bias toward action." Yet, it appears that Mr. Klein continued to resist Mr. Peterson's advances. Undaunted, Mr. Peterson continued to criticize both Mr. Klein and Mr. Everett for their lack of support. In response to one criticism of Mr. Everett, Mr. Klein responded, in a September 13, 1999, e-mail that "[t]here will always be unpopular COR determinations but I fully expect each call to be based upon the contract/lease provisions and made without prejudice to any of the parties." Yet, Mr. Peterson was apparently allowed to review draft CODs and requested that changes be made in those drafts.

This alternating pattern of probing by Mr. Peterson and resistance by Mr. Klein continued until early 2001, when the former again accused the latter of inadequate support. On January 30, 2001, Mr. Peterson informed Mr. Klein that Col. Thompson felt

that Mr. Everett "should be more responsive to supporting our requirements (specifically supporting Connie [Kiser])," the next day stating to Mr. Klein that "[i]t's time to back [Ms. Kiser] 100%." A few days later, Mr. Peterson sent Mr. Klein and others an e-mail in which he stated "[i]f there is lease ambiguity, our project manager's position should still be supported as completely and clearly as possible by [Mr. Everett]," adding that "[h]e is not paid to be neutral, but to aggressively support a reasonable government position." The latter statement, of course, clashes harshly with the instructions given contracting officers by the FAR. Several months later, Col. Meeks, Mr. Peterson's superior, requested that a formal protocol be established under which his staff, including Mr. Peterson, would review and comment on draft contracting officer decisions before they were finalized. While the record indicates that such a process likely was implemented in August of 2001, it appears to have taken hold only after the settlement of this action collapsed and Mr. Klein was replaced by Mr. Hopson in January or February of 2002. Describing the review practice under which he operated, Mr. Hopson acknowledged at trial that "there was an agreement in place that the [Department of Public Works] would review the draft [contracting officer decision] before it was finalized."[68]

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[68] By way of further explanation, Mr. Hopson responded to questions on this subject posed by defendant's counsel, as follows:

> Q: Yes. When you were in agreement with Mr. Killian that you allowed the [A]rmy to review and approve

There are indications in the record that, while Mr. Klein resisted Mr. Peterson's interference, Mr. Everett and, later, Mr. Hopson finally succumbed to the constant drone of criticism they received from Mr. Peterson, Ms. Kiser and others. The record suggests that at least one COD, involving whether depreciation was applicable to counter tops, was changed by Mr. Hopson after concerns were expressed by Mr. Peterson's successor, who complained that "if we allow this COD to go out as is, we are opening ourselves up for complete failure on all key issues and litigation will CONSUME our daily efforts." While the record does not reveal what other modifications were made to draft decisions following the review by the DPW, there are indications that this process was not simply consultative, but rather

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draft contracting officer's decision[s], what did you mean?

A: I meant that we allowed the [A]rmy to review and approve the draft [contracting officer decisions (CODs)] before they were finalized.

Q: How did the [A]rmy approve those CODs?

A: There was a little form, a one-page form that they just put on. It was concur or nonconcur, or I think there was a place on there for comments as well.

Q: Do you remember if they ever nonconcurred with a draft contracting officer's decision?

A: Yes.

Q: Do you remember if you ever changed a draft contracting officer's decision based upon a noncurrence by the [A]rmy?

A: No, sir, I do not.

designed to coerce Mr. Hopson into abandoning his independence. In this regard, it appears to have been successful. Thus, at trial, Mr. Hopson admitted that he did not personally investigate many of North Star's claims-in some of those instances, he admitted at trial that he ruled adversely without reviewing all the documentation; in other instances, his failure to investigate led him never to reach a final decision on important claims (*e.g.*, stockpiling); and in another instance, he testified that he had presumed that documents explaining the government's position on the calculation of downtime had been provided to North Star, when, in fact, a simple inquiry would have revealed that they had not. Further, at trial, Mr. Everett described instances in which he raised issues with Mr. Hopson and did not receive responses over lengthy periods of time.[69]

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[69] One of the times this apparently occurred involved providing North Star with the calculations that allegedly supported the Army's reductions in rent due to alleged excessive downtime. These reductions first occurred in February of 2002. On April 30, 2002, Mr. Wartes sent a letter to Mr. Everett requesting the backup documentation for the reductions made in February and March of 2002. Mr. Everett did not respond to the letter. On May 24, 2002, Mr. Wartes sent a second letter to Mr. Everett, which he forwarded to Mr. Hopson. On May 30, 2002, Ms. Ronnie Sekyra of North Star made a request for the same materials directly to Mr. Hopson. Mr. Everett testified that he did not receive any response from Mr. Hopson regarding this issue. With the rent reductions continuing, on August 1, 2002, Mr. Wartes sent a third letter complaining that the backup documentation was still not being supplied to North Star. When asked, at trial, why that documentation had not been forwarded, Mr. Everett responded that it was because "I hadn't heard back from the contracting officer."

In the court's view, the record, as a whole, supports a finding that, under mounting pressure from Mr. Peterson, Ms. Kiser and others, Mr. Hopson abdicated his responsibility to make independent decisions that were, as required by the FAR, impartial, fair, and equitable. *See Sergent Mech. Sys., Inc. v. United States*, 34 Fed. Cl. 505, 523 (1995) (contracting officer breached duty under FAR to be impartial and unbiased where he failed to consider documents produced by contractor); *Beals Plumbing & Heating, Inc.*, 1964 B.C.A. 4144, ¶ 4358, 1964 WL 694 (1964) (contracting officer did not render a personal and independent decision where he "acquiesced completely"). Because Mr. Hopson received various of the communications in which Mr. Peterson expressed his contempt for North Star, the court is left with no conclusion but that, in ruling (or declining to rule) on many of the critical issues discussed above, he participated in, or at least facilitated, the breach of the covenant of good faith and fair dealing.[70] In short, the record gives unfortunate meaning to that portion of the Miami football analogy in which Mr. Peterson observed-

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[70] Mr. Hopson, indeed, was one of the individuals who received the "Miami football" e-mail. Contradicting Mr. Peterson's alleged impressions, he testified at trial that he did not think that the tone of this e-mail was "fair and equitable and impartial." Yet, it appears that he took no steps to address the situation. *Compare Libertatia*, 46 Fed. Cl. at 711 ("The CO's failure to inquire into and remedy the COR's bad faith coupled with the lack of evidence that the CO exercised independent judgment in applying the standards of the contract results in the court's finding of bad faith on the part of the government in administering the contract.").

"always remember that you have home field advantage."

Apparently unsatisfied with disrupting the internal dispute resolution mechanism, Mr. Peterson, Ms. Kiser and perhaps others sought to wield other government processes to harass North Star. Thus, in November 2001, Mr. Peterson recommended that the DPW request that North Star be audited for fraud by IRACO. This recommendation appeared to be based, in large part, on the fact that North Star had replaced the tumblers in several locksets with used tumblers, while charging defendant for new ones. When this issue was raised with North Star, it readily reimbursed the Army the $135 involved. Yet, even after the IRACO audit yielded little in the way of adverse findings-indeed, attributing most of the identified problems to faulty government accounting-Mr. Peterson and others pressed for, and eventually obtained, a criminal investigation of the matter. That investigation delayed resolution of this case by more than a year, during which period, Mr. Peterson, Ms. Kiser and others continued to abuse North Star on an almost daily basis. While the court cannot determine definitively whether other government officials improperly pursued the criminal investigation,[71] it finds that Mr. Peterson's and Ms.

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[71] Disturbingly, the record reveals that an IRACO representative viewed the agency's audit as a way to support the development of defenses in this litigation. The court is concerned with the prospect of defendant using an investigation to supplement its discovery in a case before this court, an act that seemingly constitutes abuse of both the investigative and discovery processes. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 433-34 (1983) ("In either case, limitations imposed on

Kiser's involvement therein represented yet another example of their desire to use the wheels of government to grind down North Star for its failure to comply with their interpretations of the Lease.

d. Redux

This court is thoroughly convinced, based on the record as a whole, that a number of Army officials acted in bad faith in administering the Lease during the period in question, seeking to evade the spirit of the contract, wilfully rendering imperfect performance and interfering with North Star's performance of the contract. The actions these officials took far exceeded strict insistence on contract compliance and instead took the form of a prolonged campaign designed to harm North Star. Over time, their bad faith infected virtually every aspect of the administration of the Lease, including, most remarkably, the dispute resolution process. To be sure, not every government actor here is equally culpable-some, like Mr. Peterson and Ms. Kiser, were aggressive prime movers, seemingly obsessed with an intent to injure North Star; others, like Mr. Hopson and to a lesser extent, Mr. Everett, contributed to the harm by allowing themselves to be co-opted and by failing to address the bad faith exhibited by other

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investigation and discovery exist for sound reasons-ranging from fundamental fairness to concern about burdensomeness and intrusiveness.... To allow these agencies to circumvent their usual methods of discovery also would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual *ex parte* form of discovery....").

officials. Nonetheless, in the court's view, the cumulative and pernicious impact of these individual acts of bad faith exceeded their individual weight, leading the court to conclude that, collectively, the conduct of the governmental actors who dealt with North Star fell far below the standard of good faith that is integral to the Federal procurement system.

The court must next determine the relief plaintiff is owed.

C. Damages

The general rule in common law breach of contract cases," the Federal Circuit has oft-stated, "is to award damages sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed," *San Carlos Irrigation & Drainage Dist. v. United States,* 111 F.3d 1557, 1562-63 (Fed. Cir. 1997), in short, to give the injured party "the benefits [it] expected to receive had the breach not occurred." *Glendale Federal Bank, FSB v. United States,* 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement, *supra,* at § 344(a)); *see also Franconia Assocs.,* 61 Fed. Cl. at 746. Conversely, it is also axiomatic that "the non-breaching party should not be placed in a better position through the award of [expectancy] damages than if there had been no breach." *Bluebonnet Sav. Bank, FSB v. United States,* 339 F.3d 1341, 1345 (Fed. Cir. 2003). As such, "[e]xpectation damages are recoverable provided they are 'actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty.'" *National Australia Bank v. United*

States, 63 Fed. Cl. 352, 355 (2004), *aff'd in part, rev'd in part on other grounds*, 452 F.3d 1321 (Fed. Cir. 2006) (quoting *Bluebonnet*, 266 F.3d at 1355); *see also Cuyahoga Metro. Housing Auth. v. United States*, 65 Fed. Cl. 534, 543 (2005).

1. Loss of Value

Relying on testimony from its expert, Dr. Bill Mundy, North Star attempted to quantify the cumulative impact of the various breaches-both of Lease provisions and the covenant of good faith and fair dealing-effectuated by Army officials. Specifically, it measured the alleged diminution in the value of Birchwood by comparing the market value of that development as of September 1, 2002 (the "after value"), to what that value would have been as of that date absent any breaches of the Lease (the "before value"). North Star claims that the resulting figure-$8.6 million-is the loss in the value of Birchwood incurred as of September 1, 2002.

For its part, defendant asserts that any diminution of the value of Birchwood falls into the category of nonrecoverable consequential damages. Indeed, various cases have rejected claims that the government's conduct under a contract allegedly led to the destruction of the contractor's business. *See, e.g., Ramsey v. United States*, 121 Ct. Cl. 426, 101 F.Supp. 353, 357-58 (1951), *cert. denied*, 343 U.S. 977 (1952); *United Med. Supply Co. v. United States*, 63 Fed. Cl. 430, 440 (2005); *Industrial Indem. Co. v. United States*, 26 Cl. Ct. 443, 445-46 (1992); *see also* Cibinic, Nash & Nagle, *supra*, at 719-20. Moreover, the Federal Circuit and this court have emphasized

that "the preferred way for a contractor to prove increased costs is to submit actual cost data because such data 'provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that-equitable-and not a windfall for either the government or the contractor.' " *Propellex Corp. v. Brownlee,* 342 F.3d 1335, 1338-39 (Fed. Cir. 2003) (quoting *Dawco Constr. Inc. v. United States,* 930 F.2d 872, 882 (Fed. Cir. 1991), *overruled on other grounds by Reflectone v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995)). Nonetheless, various decisions have allowed contractors to pursue damage methods in which their total costs in performing a contract are compared to the reasonable cost of providing the same services.

An example of such a method is the modified total cost method. Before a contractor can obtain the benefit of that method, it must prove: "(1) the impracticability of proving its actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs." *Propellex,* 342 F.3d at 1338-39 (citing *Servidone Constr. Corp. v. United States,* 931 F.2d 860, 861 (Fed. Cir. 1991)). The modified total cost method is the total cost method adjusted for any deficiencies in the contractor's proof in satisfying the requirements of the total cost method. *Id.* In *Boyajian v. United States,* 191 Ct. Cl. 233, 423 F.2d 1231 (1970), the Court of Claims described the use of this method, thusly:

> [T]he total cost computation was used as "only a starting point" with such adjustments

> thereafter made in such computation as allowances for various factors as to convince the court that the ultimate, reduced, figure fairly represented the increased costs the contractor directly suffered from the particular action of defendant which was the subject of the complaint.

Id. at 1240 (citation omitted); *see also Propellex Corp.*, 342 F.3d at 1339. Based upon these cases, it is conceivable that plaintiff could prove that the economic impact of the sundry breaches effectuated by the Army were individually impractical to prove and instead could be collectively captured, provided that adjustments were made to ensure that the resulting figure "fairly represented the increased costs the contractor directly suffered from the particular action of defendant." *Boyajian*, 423 F.2d at 1240; *see also* Cibinic, Nash & Nagle, *supra*, at 730 (discussing how to measure loss of efficiency).

In attempting to isolate the costs attributable to defendant's breaches, Dr. Mundy compared the operating expenses at Birchwood with those at another housing development, Sprucewood Homes (Sprucewood). Sprucewood is owed by Polar Star Alaska Housing Corporation (a subsidiary of North Star) and is also leased to the United States. As reflected in Table 10 below, taken from his report, Dr. Mundy used the 1996 expenses of each facility as a base and determined that from 1996 through 2001, Sprucewood's operating expenses dropped by

Table 10 Operating Expense Analysis

	2001	2000	1999	1998	1997	1996
Net	$3,949,630	$3,976,644	$4,014,984	$4,059,579	$4,060,929	$4,331,276
Debt Serv	$3,115,078	$3,115,076	$3,115,078	$3,115,076	$3,115,076	$3,374,668
Prop Tax	$ 199,615	$ 226,371	$ 239,224	$ 253,387	$ 239,289	$ 258,862
Ins.	$ 35,745	$ 34,442	$ 45,179	$ 54,787	$ 61,767	$ 49,092
Repl Res	$ 75,000	$ 75,000	$ 75,000	$ 75,000	$ 97,435	$ 81,250
Oper Exp	$ 524,192	$ 525,755	$ 540,503	$ 561,329	$ 547,362	$ 567,404

	2001	2000	1999	1998	1997	1996
Net	$7,893,346	$7,488,953	$7,909,868	$7,953,263	$8,461,875	$7,816,801
Debt Serv	$6,594,062	$6,048,617	$6,599,390	$6,597,457	$7,141,637	$6,596,392
Prop Tax	$ 561,666	$ 550,000	$ 588,664	$ 600,000	$ 650,000	$ 590,000
Ins.	$ 41,596	$ 37,698	$ 43,692	$ 56,595	$ 72,994	$ 73,951
Refuse	$ 12,000	$ 15,973	$ 26,383	$ 19,543	$ 25,265	$ 12,000
Oper Exp	$ 684,022	$ 836,765	$ 651,739	$ 679,668	$ 571,979	$ 544,458

	2001	2000	1999	1998	1997	1996
Polar	$ 567,404	-$ 43,212	-$ 41,649	-$ 26,901	-$ 6,075	-$ 20,042
North	$ 544,458	$ 39,564	$ 292,307	$ 107,281	$ 135,210	$ 27,521
per year		$ 182,776	$ 333,956	$ 134,182	$ 141,285	$ 47,563

Polar	-$ 37,879
North	$ 701,883
Polar Star/North Star Difference	$ 839,762
Rounded	$ 840,000

$137,879, while Birchwood's expenses increased by $701,883. Dr. Mundy attributed the entire difference of approximately $840,000 to the Army's conduct.

He then performed two additional calculations. First, he estimated the value of the deviation in operating expenses as of September 1, 2002, essentially assuming that the additional operating expenses expended as a result of the breaches had

been reinvested at a 15 percent rate of return, yielding a value, as of September 1, 2002, of approximately $1.3 million. Second, he compared the "before" and "after" values of Birchwood, that is, he estimated the diminution in the market value of Birchwood as of September 1, 2002, by comparing the value of the property with the excess operating expenses to the value without such expenses. As reflected in Fact Appendix III, which reproduces Tables 12, 13 and 14 from his report, Dr. Mundy estimated the present value of the future cash flows associated with the property, using discount rates of 11 and 13 percent, respectively, for the "before" and "after" models. As of September 1, 2002, the difference between these two figures-$60,800,000 for the before value and $52,200,000 for the after value-yielded a loss in value of $8,600,000, which he attributed to the Army's conduct.

However, Dr. Mundy's analysis and calculations are riddled with flaws-so many, in fact, as to render his findings worthless. Although by no means exclusive, among the most serious of his mistakes are the following:

- **Comparability of the two facilities.** Dr. Mundy made no adjustments to his comparison between Sprucewood and Birchwood, even though the former has fewer units that, on average, are smaller than those at Birchwood. In assessing operating expenses, Dr. Mundy also did not take into account the fact that, unlike Birchwood, Sprucewood had been renovated between 1994 and 1996. Nor, in comparing the two facilities, did he account for the fact that

certain services provided by North Star at Birchwood were not provided by Polar Star at Sprucewood-for example, refuse removal, snow removal, maintenance of common areas, and appliance replacements. In fact, as indication of the depth of his prior investigation (or lack thereof), Dr. Mundy did not even know that the latter services were provided via other contractors at Sprucewood. Overall, the court is left unable to determine, for itself, an accurate comparability of the two facilities.

- **Assumption that increased costs at Birchwood were attributable to the Army's improper actions.** Dr. Mundy made no individual investigation to determine which government actions, if any, accounted for the $840,000 deviation in operating expenses between the two facilities. Indeed, even a cursory review of the expenses at Birchwood reveals that Dr. Mundy included within the amount that he believed recoverable, for example, the costs for repairing a garbage truck and other vehicles; moneys expended on purchasing a new vehicle, a computer, a copier and a fax machine, uniforms, and a snow plow; and expenses for boiler maintenance, landscaping maintenance, deposits to reserve accounts, training and for Mr. Wartes to attend a conference.[72] These costs were significant-

[72] At trial, Dr. Mundy claimed that his failure to segregate these costs was harmless, because similar types of expenditures were incurred at Sprucewood. The record, however, did not bear

amounting to hundreds of thousands of dollars. Moreover, Dr. Mundy did not account for inflation in his cost analysis, thereby essentially assuming that the inflation components of salaries and other types of expenses associated with Birchwood are recoverable from defendant. The court is left in no position, at least from Dr. Mundy's study, to determine what portion of the increased costs at Birchwood is reasonably attributable to the Army's conduct.

- **Failure to investigate obvious anomalies in the cost data.** Dr. Mundy was faced with operating expenses for Sprucewood that declined over the period in question-from $567,404 in 1996 to $524,192 in 2001. Accordingly, while he assumed that the growth in Birchwood's operating expenses from 1996 through 2001 was abnormal, he failed to consider whether Sprucewood's apparent decrease in operating expenses over that same period was the actual

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out this claim and, certainly, there is no indication that prior to trial, Dr. Mundy determined, for example, whether there was any significant variance between the two facilities in terms of capital and other significant expenditures. Indeed, Dr. Mundy admitted that had Sprucewood failed to make certain expenditures listed on its books that were not essential-for example, $2,800 for Christmas cards and a party-he would have attributed the additional difference between Birchwood's and Sprucewood's costs as recoverable damages. Thus, when asked "[a]re you saying that your calculations are not sensitive to what the specific expenditures were made for? Just looking at the overall amount, but not sensitive at all to what they're actually being expended for?", he answered, "[w]ell that is true."

abnormality. And, of course, the record indicates that the latter statistics were understated because, *inter alia,* they did not include all the expenses that were being incurred by the Army to maintain Sprucewood.[73] The statistics that Dr. Mundy quoted in his report also show that the expenses for North Star inexplicably surged to $836,765 in 2000 (the year that the preliminary settlement of this action occurred) and then rolled back to $684,022 in 2001 (the year that the settlement collapsed). These unanswered questions only heighten the unreliability of Dr. Mundy's study.

- **Faulty mathematics and assumptions in the cash flow analysis.** The record indicates that Dr. Mundy miscalculated the operating expenses for Birchwood, with financial reports indicating that the actual expenses from 1996 through 2001 were nearly $300,000 less.[74] In addition, Dr. Mundy relied on several assumptions that the record demonstrates are faulty. For example, in

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[73] Indeed, while one can envision that defendant might be liable for a portion of the increased costs at Birchwood, it is difficult to conceive why defendant should be liable to the extent that operating costs decreased at Sprucewood.

[74] The following chart compares the actual operating expenses for the given years with those employed by Dr. Mundy:

Dr. Mundy	**$544,458**	**$571,979**	**$679,668**	**$651,739**	**$836,765**	**$684,022**
Actual	**$540,776**	**$534,634**	**$624,714**	**$558,716**	**$745,591**	**$644,258**
Overstatement	**$ 3,682**	**$ 37,345**	**$ 54,954**	**$ 93,023**	**$ 91,174**	**$ 39,764**

> determining his cash flows, he did not take into account the fact that the Lease expires on March 5, 2007, but rather assumed that income and expenses could be projected through 2018. Accordingly, he did not consider what North Star's income and expenses would be under an alternative scenario, such as the leasing of Birchwood units to private individuals.[75]

Given the many problems that plague Dr. Mundy's cost analysis, pointing out further deficiencies in his valuation of the deviation in operating expenses and income valuation of Birchwood is perhaps asking to be flagged for "piling on." Yet, those deficiencies are many.[76] The result is an expert opinion that bears

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[75] If Dr. Mundy's assumptions are correct, the termination of the Lease could: (i) decrease North Star's operating expenses by removing the Army as the primary tenant; (ii) decrease its income, particularly as the facility is transferred to private use (assuming that is possible); and (iii) increase North Star's costs to the extent that the Army utilized a clause in the lease of the underlying land to North Star that required rent to be paid the Army from the termination of the Lease until the expiration of the land lease in 2018.

[76] For example, in estimating the value of the deviation in operating expenses, Dr. Mundy assumed that North Star would have reinvested the expenses saved at a return rate of 15 percent. While he does not refer to the latter category as interest, in fact, his calculation serves the same purpose. *See Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986) (recovery of interest subject to sovereign immunity considerations, which "cannot be avoided simply by devising a new name for an old institution"). As such, his calculations would appear to afford plaintiff interest at a rate that plainly exceeds the interest rate provided by the CDA. *See* 41 U.S.C. § 611. Further, Dr.

none of the considerable evidentiary weight plaintiff piles upon it.

Indeed, even if Dr. Mundy had succeeded in isolating the sorts of costs that could be reasonably attributed to defendant's breaches, it is far from clear that plaintiff could recover a figure corresponding to the alleged diminished value of Birchwood, at least without the incidence of a transfer. Such an approach seemingly crosses beyond the recovery of the additional costs attributable to defendant's conduct and into the recovery of the sort of consequential damages prohibited by the law. *See Northern Helex Co. v. United States,* 207 Ct. Cl. 862, 524 F.2d 707, 720-21 (1975), *cert. denied,* 429 U.S. 866 (1976) (indicating a party may not recover damages "if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract") (quoting *Myerle v. United States,* 33 Ct. Cl. 1, 26 (1897)); *see also Wells Fargo Bank, N.A. v. United States,* 88 F.3d 1012, 1022-23 (Fed. Cir. 1996), *cert. denied,* 520 U.S. 1116 (1997).

Mundy's cash flow analysis employs discount rates for both scenarios (with and without the additional costs) that appear to be lower than what would be indicated by the risks associated with the property. If the spread between the two discount rates remained the same, the raw difference in value calculated would diminish as the discount rates increased. In particular, the fact that a prudent buyer would not know under either scenario whether the Lease would be extended beyond May 5, 2007, seemingly would mitigate in favor of a very high discount rate.

2. Other Damages

North Star claims additional damages, totaling over $2.5 million, allegedly incurred from 1997 through September 1, 2002, that it asserts are not included in Dr. Mundy's report. These damages can be grouped into two categories: (i) $1,445,972 for damages (including overhead and profit) associated with carpet depreciation and matching, interior paints and wall repairs, short-term occupancies, fire damage and other 2003 claims, as well as unpaid overhead, rent deductions, lost incentive fees and cleaning costs;[77] and (ii) $1,193,593 for damages for additional payroll and subcontractor costs. While plaintiff attempted to prove these damages primarily with testimony from Ms. Sekyra, its Treasurer, there are several obvious problems with these figures. First, significant portions of the dollars represented by them correspond to monetary claims that have not yet been resolved by the contracting officer and over which, as analyzed above, the court lacks jurisdiction (at least in terms of establishing a monetary amount

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[77] As reflected in a damage chart attached to plaintiff's post-trial brief, this figure is calculated thusly:

Damages for matching, depreciation, interior paints, wall repairs, fire, 2003 claims except cleaning and short-term occupants.	$ 492,343
Overhead (40% times $492,343)	$ 196,937
Profit (10% times $196,937)	$ 19,964
Subtotal	$ 708,974
Unpaid overhead, rent deductions, incentive fees and cleaning	$ 736,998
Total	$1,445,972

owed). Second, some portions of the damages claimed correspond to categories for which the court has found against plaintiff, owing either to contractual interpretation (*e.g.*, refuse) or a lack of proof as to the underlying liability (*e.g.*, short-term occupants). Third, it is difficult to segregate from the categories of damages sought those that relate to the claims that the court has sustained-for example, the erroneous imposition of depreciation, and the improper assertion of rent deductions, as well as payroll and subcontractor costs attributable to bad faith practices such as stockpiling. Fourth, based upon the court's rulings, some of the damages sought are premature-for example, plaintiff's entitlement to incentive fees awaits further determinations on a remand to the agency. In general, while the record contains mounds of data, plaintiff has yet to place the court in a position where it can definitively determine an appropriate amount of damages.[78]

Much the same can be said of plaintiff's attempt to prove, alternatively, the same sorts of damages covered by Dr. Mundy's report. Significant portions of these damages are attributable to North Star's replacement of items-vinyl, carpet, refrigerators and stoves-that were either damaged or not maintained by occupants at Birchwood. The process for deriving these figures, however, involved little more than Mr.

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[78] The court has considered whether to apply the "jury verdict method" of awarding damages. That method, however, is highly disfavored. *Dawco Constr.*, 930 F.2d at 880-81. It is employed only where: (i) there is clear proof of injury; (ii) there is no more reliable method of computing damages; and (iii) the evidence is sufficient for the court to make a fair and reasonable approximation of damages. *WRB Corp.*, 183 Ct. Cl. at 425.

Wartes performing "back-of-the-napkin" type estimates and lacks the reliability necessary for the court to award damages. Accordingly, the court finds that plaintiff's proof of these alternative damages is also inadequate.

III. CONCLUSION

Vince Lombardi once described "[a] game that requires the constant conjuring of animosity." But, he was talking about football, not government contract administration. His statement, nonetheless, captures the essence of defendant's administration of the contract *sub judice,* in which there was a "constant conjuring of animosity." Certainly, North Star is not entirely blameless in this matter. Yet, the law requires those administering government contracts to measure their responses even as to, and perhaps particularly as to, perceived malperformance. Even the worst suspicions do not dislodge the expectation, solidly rooted in the FAR, that contracts be administered fairly and impartially. Nor do defects in performance, perceived or real, permit administrators to cross the dividing line from good faith into bad by imposing their own form of vigilante justice. By clear and convincing evidence, the record shows that the latter occurred here, both in the context of specific breaches of the subject contract and in other calculated efforts to diminish the profitability of plaintiff's performance thereunder.

But, such liability, no matter how egregious, does not obviate the necessity for plaintiff to prove its

damages.[79] And, as noted, plaintiff's proof is lacking in critical regards. Nonetheless, based upon the foregoing, it would appear that, for the periods in question, as properly before the court, plaintiff is entitled to recover the costs associated with rent abatements (liquidated damages). In terms of other relief, plaintiff is also entitled to declarations regarding the following items: (i) the depreciation of carpeting and other items; (ii) the matching of adjacent replacement items; (iii) carpet and vinyl in unit 833; (iv) the gutter down spout in unit 638; (v) the repainting of unit 961; (vi) the correctness of its interpretations of the Lease, and the requirements of the covenant of good faith and fair dealing, with respect to the enumerated actions that increased downtime and otherwise increased North Star's costs; and (vii) any other issues resolved in plaintiff's favor herein or in prior rulings. In addition, the court finds that the incentive fee determinations for 1997 through 2003 are arbitrary and capricious and shall be set aside. Those fees shall be redetermined by the Army, said issues to be resolved in conformity with the rulings herein and specifically without reference to the resident surveys and any other materials or evaluations prepared by, or significantly impacted by the directions of, Mr. Peterson or Ms. Kiser.[80]

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[79] Whether plaintiff is entitled to attorney's fees and other costs is an issue for a later day. *See* 28 U.S.C. § 2412(d).

[80] Based upon the many adverse findings rendered herein, the court also expects the Army to exercise proper care in considering the weight that should be afforded to materials or other evaluations prepared by other officials.

To effectuate this ruling:

1. The incentive fee matter is remanded to the Army for redetermination in accordance with this opinion, with a final decision as to each of the affected years to be filed on or before June 22, 2007. Said decision shall contain a detailed description of the materials relied upon by the Incentive Fee Board in rendering its decision and specific findings in support of the fee determination.

2. On or before May 4, 2007, the parties shall file a status report proposing the judgment amount that otherwise should be entered in these cases, taking into account this and all prior rulings in this case.

3. Should the parties agree as to the amount of the proposed judgment, they shall so indicate. Agreeing to the entry of such judgment neither signifies agreement with this court's findings and conclusions nor waives any arguments or rights the parties might otherwise have, nor, in particular, impacts upon any party's right to an appeal.

4. If the parties disagree as to the proposed judgment, they shall, in the filing described in paragraph 2, submit competing proposals for that judgment, together with an explanation as to why they believe their proposal more accurately tracks this court's opinion.

5. Should the procedure in paragraph 4 prove necessary, on or before May 25, 2007, the parties may file a response to the proposed judgment and rationale offered by the other party.

6. This process shall not be employed to reargue or seek reconsideration of any of the points resolved by this court's findings and conclusions.

7. This opinion shall be published, as issued, after April 2, 2007, unless the parties identify protected and/or privileged material subject to redaction prior to said date. Said materials shall be identified with specificity, both in terms of the language to be redacted and the reasons for the redaction.

The parties are, yet gain, encouraged to settle these cases, as well as the cases pending before the court involving later Lease years- *dum vitas est, spes est.*

IT IS SO ORDERED.

FACT APPENDIX I

CLAIM	COMPLAINT	CO CORRESPONDENCE	RESULT
Rent deductions based on alleged excess downtime: Between May 02 and Dec 04 (for the months of Feb 02 through Oct 04)	98-168C (2nd Am) ¶¶ 29-34, page 18 ¶ 3 02-1632C ¶¶ 64-76	11/25/97, 5/6/97 Request for decision regarding the meaning of the 3 day turnaround set forth in lease (no sum certain) 9/4/02 Request indicating improper downtime calculations and including specific sums for Feb-June 2002	7/29/05 Court denied motion in limine to exclude 98-168C claims Jurisdiction is lacking over monetary claims other than for Feb-June 2002
Placement of short-term occupants at Birchwood from 9/1/02 through 3/31/05	02-1632C ¶¶ 27-30	9/4/02 Request for decision	Jurisdiction is lacking for claims after 9/4/02
Matching surfaces adjacent to occupant damage replacements from 2/02 through 11/04	03-2699C ¶¶ 11-19	10/23/02 Request for a decision regarding carpet replacement (no sum certain) 12/4/02 Request for a decision regarding matching counter tops (no sum certain)	Jurisdiction appropriate for declaratory relief
Unnecessary interior paints performed after a lease anniversary date between 11/02 and 12/04 (unbilled) Billed unnecessary interior paints performed after a lease anniversary date post 9/02	03-2699C ¶¶ 20-28	11/21/02 Request for decision regarding Unit 704 (no sum certain)	Jurisdiction is lacking for units other than 704. Jurisdiction is lacking for a monetary claim regarding Unit 704
Claims that plaintiff alleges relate to defendant's decision not to grant incentive awards, downtime calculations that led to rent deductions, increased payroll costs, and increased subcontractor costs but that do not specifically appear in Plaintiff's damages chart: 1) Plaintiff did not receive extra time for change of occupancy work 2) Units released (to be turned over) without adequate notice 3) Stockpiling of units by govt	98-168C (2nd Am) ¶ 49 (stockpiling) 02-1632C ¶¶ 59-61	9/4/02 Request for decision outlines these practices	Jurisdiction is lacking for claims after 9/4/02

CLAIM	COMPLAINT	CO CORRESPONDENCE	RESULT
4) Change of inspection procedures through 2005			
Reduction and Elimination of Incentive Fee Awards Through 2004	98-168C (2nd Am) ¶¶ 57-62, page 18 ¶ 7 (the court struck the phrase "and thereafter" on 5/31/02 so this complaint is only for 1998) 02-1632C ¶¶ 77-82	3/29/99 Requests decision for 1998 award. 9/4/02 Request describes failure to make awards (no sum certain)	Jurisdiction appropriate for declaratory relief.
Depreciation between 2002 and 2004	98-168C (2 Am) ¶¶ 41-42, page 18 ¶ 4	1/28/98 Requesting decision (no sum certain) 9/4/02 Requesting decision (no sum certain)	10/4/04 Court granted summary judgment for plaintiff as to liability (but only for carpet) with amount of damages to be determined Jurisdiction is lacking for monetary claims
Matching carpet in Unit 884	03-2699C ¶¶ 14-19	10/23/02 Requesting determination of responsibility (no sum certain)	Jurisdiction is lacking for monetary claims
Interior Painting of Unit 704	03-2699C ¶¶ 20-28	11/21/02 Requesting determination of responsibility (no sum certain)	Jurisdiction is lacking for monetary claims
Carpet and Vinyl in Unit 833	03-2699C ¶¶ 29-38	12/16/02 Requesting determination of financial responsibility (no sum certain)	Jurisdiction is lacking for monetary claims
Vinyl in Units 1090 and 1111	03-2699C ¶¶ 43-48	3/25/03 Requesting decision whether plaintiff repaired vinyl satisfactorily to avoid replacement (no sum certain)	Jurisdiction is lacking for monetary claims
Gutter down spout in Unit 638	03-2699C ¶¶ 63-66	8/11/03 Requesting decision whether defendant contractually obliged to issue work authorization for correction of occupant damage (no sum certain)	Jurisdiction is lacking for monetary claims

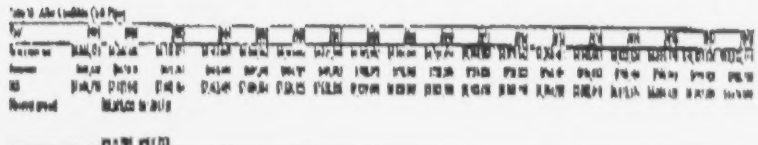
CLAIM	COMPLAINT	CO CORRESPONDENCE	RESULT
Carpet and Counter top in Unit 961	03-2699C ¶¶ 72-76	8/11/03 Requesting decision regarding financial responsibility	Jurisdiction is lacking for monetary claims
Vinyl in Unit 633	03-2699C ¶¶ 49-52	6/13/03 Requesting determination whether vinyl damaged by occupants is plaintiff's responsibility to replace (no sum certain)	Jurisdiction is lacking for monetary claims
Repainting bathroom in Unit 961	03-2699C ¶¶ 67-71	8/11/03 Requesting determination as to whether painting quality should be evaluated with naked eye or black light (no sum certain)	Jurisdiction is lacking for monetary claims
Cleaning of Units	03-2699C ¶¶ 77-81	8/26/03 Requesting decision regarding responsibility (no sum certain)	Jurisdiction is lacking for monetary claims
General claims that relate to the above repair claims but are not specifically included in plaintiff's damages chart:		7/22/03	
1) changing and failing to approve list of repair costs; requiring invoices	03-2699C ¶¶ 53-58	Requesting decision re: Army failure to approve list and Army imposition of new invoice requirement (no sum certain)	Jurisdiction is lacking for monetary claims
2) authority to order disputed work	03-2699C ¶¶ 59-62	7/31/03 Requesting decision on whether Housing Manager has authority to direct disputed work (no sum certain)	Jurisdiction is lacking for monetary claims
Occupant damage wall repairs	02-1632C ¶¶ 38-47 (general occupant damage)	Plaintiff did not raise to CO 9/4/02 Requesting decision on issuing work authorizations for general occupant damage.	Jurisdiction is appropriate for declaratory relief on general occupant damage
Replacement of occupant damaged stoves	02-1632C ¶¶ 38-47 (general occupant damage)	Plaintiff did not raise to CO 9/4/02 Requesting decision on issuing work authorizations for general occupant damage.	Jurisdiction is appropriate for declaratory relief on general occupant damage

CLAIM	COMPLAINT	CO CORRESPONDENCE	RESULT
Replacement of occupant damaged refrigerators	02-1632C ¶¶ 38-47 (general occupant damage)	Plaintiff did not raise to CO 9/4/02 Requesting decision on issuing work authorizations for general occupant damage.	Jurisdiction is appropriate for declaratory relief on general occupant damage
Vinyl replaced due to occupant failure to maintain	02-1632C ¶¶ 38-47 (general occupant damage)	6/13/03 Requesting decision as to whether vinyl with a non-pleasing appearance due to occupant damage is the responsibility of North Star	Jurisdiction is appropriate for declaratory relief
Carpet replaced due to occupant failure to maintain	02-1632C ¶¶ 38-47 (general occupant damage)	Plaintiff did not raise to CO	Jurisdiction is lacking
Additional payroll due to additional accounting and scheduling burden (97-02)	1/13/06 Plaintiff's post trial brief	Plaintiff did not raise to CO	Jurisdiction is lacking
Additional payroll 97-05	1/13/06 Plaintiff's post trial brief	Plaintiff did not raise to CO	Jurisdiction is lacking
Additional subcontractor costs (1996-2004)	1/13/06 Plaintiff's post trial brief	Plaintiff did not raise to CO	Jurisdiction is lacking
Full interior painting of units when only a touch-up was necessary (1997-9/1/02)	1/13/06 Plaintiff's post trial brief	Plaintiff did not raise to CO	Jurisdiction is lacking
Outstanding Overhead and Profit from 1998-5/00	1/13/06 Plaintiff's post trial brief	9/4/02 Request for decision notes overhead issue (no sum certain)	Jurisdiction is lacking for monetary claim
Outstanding Unpaid Overhead (this appears to refer to overhead post 5/00)	1/13/06 Plaintiff's post trial brief	9/4/02 Request for decision notes overhead issue (no sum certain)	Jurisdiction is lacking for monetary claim
Refuse Collection from 1999-9/1/02	98-168C 2nd amended complaint ¶¶ 26-28, pages 17-18 ¶ 2	11/25/97 Request for decision regarding responsibility	August 8, 2005 court granted motion in limine to exclude Jurisdiction is lacking for monetary claim
Variance in costs to operate Birchwood (1997-2001) Diminution in value of Birchwood as of 9/1/02	1/13/06 Plaintiff's post trial brief	9/4/02 (for 1997-2001)-there are calculations appended for this claim	Jurisdiction over claims through 2001

FACT APPENDIX II

Unit	Inspections						Downtime			Failure to pay
	Improper notice of change of occupancy	Late work authorization	Extra inspection	No joint acceptance inspections	No list of occupant damage from pre-termination inspection	Last minute rescheduling of turnover for work date	No extra time for extra work	Late acceptance inspection and charge for lag	Counting weekends	FWT - Characterizing occupant damage as fair wear and tear. Matching - requiring matching to replaced adjacent surfaces Invoice - requiring receipt of invoice before reimbursement
895	☐	☐		☐	☐	☐	☐		☐	
1223	☐			☐	☐					
948	☐									FWT
954	☐									FWT
1127	☐					☐				
619	☐						☐	☐	☐	
760	☐								☐	FWT
920	☐				☐			☐	☐	
1227	☐									
1118					☐					
622										
812	☐									
856		☐								Invoice
1145										Matching
1148		☐					☐			FWT
1229							☐			FWT
941								☐	☐	Invoice
1117								☐		
1008										Invoice
722										Invoice
1026				☐						
915		☐			☐					FWT

Unit	Inspections						Downtime			Failure to pay
1003								□		
883								□		
961										
638						□				
948							□			
1032							□			
1253							□			
903							□			
1085							□			
949							□			
1251							□			
1031							□			
971							□			
885							□			
1237										Invoice
1004										F/W/T
748										F/W/T
745			□							
646			□							
1040					□					
884										Matching
833										F/W/T
1090							□			
1111							□			



FACT APPENDIX III

Table 14 Present Value Deviation

	End of 2001	End of 2002	Sept 1, 2002	Rounded to:
Before	$61,418,738	$60,484,127	$60,794,994	$60,800,000
After	$52,580,235	$51,991,727	$52,187,893	$52,200,000
Variance	$8,838,503	$8,492,400	$8,607,101	

Deviation Rounded to: $8,600,000

Note:

1. The present value on a per month basis is approximated by a prorata of the overall change for the year

APPENDIX F

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
ELMENDORF AFB, ALASKA 99506-0898

June 2, 2008

Office of Counsel

North Star Alaska Housing Corporation
ATTN: Ms. Rhonda Sekyra
937 Harvard Avenue East
Seattle, WA 98102-4532

Re: Contracts DACA85-1-86-71 (Outlease), DACA85-9-86-27 (Agreement to Lease) and DACA85-5-88-17 (Lease), Fort Wainwright, Alaska

Dear Ms. Sekyra:

Enclosed are my Findings of Fact and Contracting Officer's Decision (COD) regarding the Reconsideration of Contracting Officer's Final Decisions dated December 7, 2007 and March 12, 2008 in association with the claim for Stove Replacements, Carpet (Failure to Maintain), Additional Payroll, and Incentive Fees on Fort Wainwright, Alaska.

If you have any questions about the enclosed COD, please contact Ms. Anne L. Burman of our Office of Counsel at (907) 753-2532.

Sincerely,

/s/

Veronica A. Hiriams
Chief, Real Estate Division
Contracting Officer

Enclosure

FINDINGS OF FACT TO ACCOMPANY CONTRACTING OFFICER'S DECISION

Reexamination of Contracting Officer's Final Decisions
dated December 7, 2007 and March 12, 2008

Stoves Replacements
Carpet (failure to maintain)
Additional Payroll
Incentive Fees

CONTRACT NUMBERS:

DACA85-1-86-71 (Outlease)

DACA85-9-86-27 (Agreement to Lease)

DACA85-5-88-17 (Lease)

NAME AND ADDRESS OF CONTRACTOR:

North Star Alaska Housing Corporation

937 Harvard Avenue East

Seattle, WA 98102-4532

CONTRACT DESCRIPTION:

To design and construct 400 family housing units for military personnel and their families on Fort Wainwright, Alaska, pursuant to the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g), as amended by the Military Construction Authorization Act of 1986, P.L. 99-167, § 801.

The outlease is a lease of government property on Fort Wainwright to the developer, beginning on

June 27, 1986, for a period of 32 years, subject to termination clauses.

The Agreement to Lease provided for the Government to lease back the property, including the 400 housing units and related structures and improvements, upon completion of the project.

The Lease between North Star Alaska Housing Corporation (hereinafter North Star) and the Government is for a period of 19 years and six months, beginning November 6, 1987.

CONTRACT AMOUNT:

The contract amount is determined to be the combined annual total of the shelter rent and the maintenance rent costs of the 400 units over the life of the Lease. That amount excludes Work Authorization repairs and utility charges, which are paid separately by the Government. Adjustments are allowed for fluctuations in the costs of maintenance and real estate taxes.

AMOUNT IN DISPUTE:

$102,239.84 – Stoves

$167,728.64 – Carpet (failure to maintain)

$202,310.00 – Additional Payroll

$61,931.14 – Incentive Fees

$534,209.62 – plus interest

THE DISPUTE:

North Star requests payment from the Government of $534,209.62 as reconsideration of Contracting Officer's Decisions (COD), dated December 7, 2007 and March 12, 2008. This reconsideration claim includes four major claim areas (Parts B-9, B-11, C and F) as shown in North Star's claim dated August 23, 2007. North Star also requests Contract Disputes Act (CDA) interest from August 27, 2007 (receipt date of their original claim). The total sum claimed of $534,209.62 includes a total of 50 percent overhead. This reexamination decision pertains only to the following parts of the claim:

Part B-9, Stoves for which North Star alleges the Government did not take into consideration substantial evidence provided to the auditor and the Government imposed a depreciation schedule as part of its decision process for the March 12, 2008, COD.

Further, North Star noted that the calculation in the March 12, 2008 decision was in error. The calculation of the awarded amount of $5,161.00 did not include 10 percent overhead or 10 percent margin.

Part B-11, Carpet (failure to maintain) for which North Star contends that the Contracting Officer failed to take into account the fact that an actual damage calculation was provided to the auditor and was tested supporting their claim. North Star further stated that they provided additional calculations to the auditor for an additional $28,476.00 over the originally claimed amount. North Star also believes the COD effectively ignores the Court's express finding of bad faith.

Part F, Additional Payroll for which North Star contends the Defense Contract Audit Agency (DCAA) auditor's analysis of the increased payroll and the resulting COD were in error.

Part C, Incentive Fees for which North Star contends the December 7, 2007 COD failed to provide an incentive fees award for all of 2006 and for a partial year in 2007.

PERTINENT CORRESPONDENCE:

1. Reserved.

2. Reserved.

3. CDA Claim; Request for COD, dated August 23, 2007; Parts B-9, B-11 and F.

4. COD, dated December 7, 2007.

5. COD, dated March 12, 2008.

6. Request for Reexamination, dated April 29, 2008.

PERTINENT CONTRACT PROVISIONS:

6. LEASE NO. DACA85-5-88-17, EXHIBIT C: MAINTENANCE, REPAIR AND OPERATIONAL SERVICES STANDARDS ANNEX.

FINDINGS OF FACT:

Stoves – The Contracting Officer rendered a decision on March 12, 2008 concerning stove replacements. North Star has requested a reexamination of the COD, dated March 12, 2008 based on argument as discussed in their letter of request, dated April 29, 2008. North Star has additionally provided randomly selected copies of

inspection forms, checklists and inspection memos indicating stove repair requests and stove replacements. North Star further contends the Contracting Officer imposed a depreciation schedule to arrive at her conclusions in the March 12, 2008 decision.

In the request for reexamination, North Star also alleged that the calculations for stove reimbursement used by the Contracting Officer in her COD, dated March 12, 2008 did not include 10 percent overhead or 10 percent margin. North Star recalculated the March 12, 2008 award of $6,727.00, resulting in a corrected amount of $8,516.00 including 50 percent overhead and 10 percent margin. North Star requests reimbursement of $102,239.84 for this portion of the claim.

Carpet (failure to maintain) – The Contracting Officer rendered a decision on March 12, 2008 concerning Carpet (failure to maintain). North Star has requested a reexamination of the COD, dated March 12, 2008 based on argument as discussed in their letter of request, dated April 29, 2008. North Star states that the decision of March 12, 2008 effectively ignores the court's express finding regarding the Government's bad faith. North Star further requests that in accordance with their letter to the DCAA auditor dated February 27, 2008, that their claim be changed from the original $94,525.00 to $123,001.00, adding $28,476.00 to the original claimed amount before adding the additional 40 percent overhead. This claimed amount totals $167,728.64 after applying the additional 40 percent overhead.

Additional Payroll – The Contracting Officer rendered a decision on March 12, 2008 concerning Additional Payroll. North Star has requested a reexamination of the COD dated March 12, 2008 based on argument as discussed in their letter of request, dated April 29, 2008 and attachment "A" thereto. North Star believes the DCAA auditor's analysis of the increased payroll was in error. North Star has also changed the total amount of additional payroll from $458,078.00 reflected in the August 23, 2007 claim to $424,636.00 reflected in the April 29, 2008 request for reexamination. The balance requested for this claim is $202,310.00.

Incentive Fees -The Contracting Officer rendered a decision on December 7, 2007 concerning Incentive Fees. North Star believes the Contracting Officer failed to provide an incentive fee award for all of 2006 and for a partial year in 2007. An additional incentive fee award of $61,931.14 is requested in this claim.

CONCLUSION:

Stove Replacements – In regards to North Star's claim for an additional $102,239.84, I have reviewed the additional documents provided. My decision of March 12, 2008 was not based on a depreciation schedule. In an attempt to determine what is normal use and wear and tear, the Contracting Officer researched the Army regulations, another Army housing maintenance contractor, and a home equity Web site for mortgages. These sources provided a consistent indication of when stoves would need to be replaced due to cumulative wear and tear. The research reflects that it is "normal" for stoves to be replaced after 12 to 15 years of use due to cumulative chips, scratches, worn burners, worn oven seals and other parts (some replacement parts discontinued), and generally no longer of a pleasing appearance. Minor incidental deterioration resulting from normal use over time, which may be acceptable when taken singly, may result in a displeasing appearance when taken cumulatively.

In review of the random inspection sheets provided by North Star for this reconsideration, it was noted that North Star's inspector marked the stove replacements as North Star's responsibility and not as occupant responsibility. No evidence was found where the Government requested or required full replacement of stoves.

I have reconsidered my decision on stoves and still find that the chips, scratches and seals that were requested by the Government to be repaired were caused by cumulative normal wear and tear over a period of time, and I find no evidence that the replacements were due to occupant damages above

what is considered to be normal wear and tear. My decision stands as stated in the COD, dated March 12, 2008 with the exception of a calculation error noted in that decision.

A review of my decision, dated March 12, 2008 reflected the calculated costs of $5,161.00 did not include 10 percent overhead and 10 percent margin. This resulted in the awarded amount of $6,727.00 to be in error. The corrected amount including a total of 50 percent overhead and 10 percent margin should have been $8,516.00. I therefore award an additional $1,789.00 plus CDA interest from August 27, 2007 until paid.

Carpet (failure to maintain) – In regards to North Star's claim for reimbursement for $167,728.64,1 have reconsidered the evidence provided. I find evidence that North Star may have replaced the estimated amount of carpet, but not sufficient evidence that it was damaged by the occupants beyond normal wear and tear. My decision stands as stated in the COD, dated March 12, 2008. No additional funds are awarded for this part of the claim.

Additional Payroll – In regards to North Star's claim for an additional $202,310.00, I have considered North Star's comments and Attachment "A" to the request for reexamination dated April 29, 2008. After careful review by DCAA and myself, my decision stands as stated in the COD dated March 12, 2008. No additional funds are awarded for this part of the claim.

Incentive Fees – The decision on incentive fees was issued on December 7, 2007. It is the opinion of

the Contracting Officer that all previously claimed incentive fee years were addressed in the December 7, 2007 COD, and correctly identified in North Star's August 23, 2007 claim, to include the partial lease year beginning November 6, 2006 thru May 5, 2007. Please refer to the lease Supplemental Agreement Nos. 31 and 32 as well as the COD dated December 7, 2007.

In regards to this reexamination COD, North Star is hereby awarded a sum total amount of $1,789.00. I further find that CDA interest should be paid on the principle amount of $1,789.00 from August 27, 2007 until paid. This decision in no way waives the United States' right to appeal the decision of the Court of Federal Claims in Case Nos. 98-168C, 02-1632C and 03-2699C that determined entitlement to some of the claims decided in this document. My determination to pay North Star certain amounts in this document is predicated on the court's determination of entitlement and is subject to a final judgment in those cases. Should any appeal of the court's decisions be successful for the United States, then the quantum determinations contained in this decision will be null and void.

This is the final decision of the contracting officer. This decision may be appealed to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, Virginia 22041. If you decide to appeal, you must mail or otherwise furnish written notice thereof to the Armed Services Board of Contract Appeals within 90 days from the date you receive this decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken. The notice shall

indicate that an appeal is intended and identify the contract by number. The notice shall also include a copy of this decision. With regard to appeals to the Armed Services Board of Contract Appeals you may, solely at your election, proceed under the Board's small claims procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims (except as provided in the Contract Disputes Act, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Date:

_____ _____

Veronica A Hiriams
Contracting Officer

APPENDIX G

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
ELMENDORF AFB, ALASKA 99506-0898
March 12, 2008

Office of Counsel

Ms. Rhonda Sekyra
North Star Alaska Housing Corporation
937 Harvard Avenue East
Seattle, WA 98102-4532

Re: Contracts DACA85-1-86-71 (Outlease), DACA85-9-86-27 (Agreement to Lease) and DACA85-5-88-17 (Lease), Fort Wainwright, Alaska

Dear Ms. Sekyra:

Enclosed are my Findings of Fact and Contracting Officer's Decision (COD) regarding the claim for Matching Surfaces (Feb 2002 through Nov 2004), Wall Repairs, Stove Replacements, Refrigerator Replacements, Carpet (Failure to Maintain), Depreciation, Cost Book Approval, Additional Payroll, Outstanding Overhead & Margin (1998 – May 2002), and Additional 40% Overhead on Fort Wainwright, Alaska.

If you have any questions about the enclosed COD, please contact Ms. Anne L. Burman of our Office of Counsel at (907) 753-2532.

Sincerely,

/s/

Veronica A. Hiriams
Chief, Real Estate Division
Contracting Officer

Enclosure

FINDINGS OF FACT TO ACCOMPANY CONTRACTING OFFICER'S DECISION

Matching Surfaces (Feb 2002 through Nov 2004)
Wall Repairs
Stove Replacements
Refrigerator Replacements
Carpet (Failure to Maintain)
Depreciation
Cost Book Approval
Additional Payroll
Outstanding Overhead & Margin (1998 – May 2000)
Additional 40% Overhead

CONTRACT NUMBERS:

DACA85-1-86-71 (Outlease)
DACA85-9-86-27 (Agreement to Lease)
DACA85-5-88-17 (Lease)

NAME AND ADDRESS OF CONTRACTOR:

North Star Alaska Housing Corporation
937 Harvard Avenue East
Seattle, WA 98102-4532

CONTRACT DESCRIPTION:

To design and construct 400 family housing units for military personnel and their families on Fort Wainwright, Alaska, pursuant to the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g), as amended by the Military Construction Authorization Act of 1986, Pub.L. No. 99-167, § 801.

The outlease is a lease of government property on Fort Wainwright to the developer, beginning on June 27, 1986, for a period of 32 years, subject to termination clauses.

The Agreement to Lease provided for the Government to lease back the property, including the 400 housing units and related structures and improvements, upon completion of the project.

The Lease between North Star Alaska Housing Corporation (hereinafter North Star) and the Government is for a period of 19 years and six months, beginning November 6, 1987.

CONTRACT AMOUNT:

The contract amount is determined to be the combined annual total of the shelter rent and the maintenance rent costs of the 400 units over the life of the Lease. That amount excludes Work Authorization repairs and utility charges, which are paid separately by the Government. Adjustments are allowed for fluctuations in the costs of maintenance and real estate taxes.

AMOUNT IN DISPUTE

$ 44,826.00 – Matching Surfaces, plus additional 40% O/H

$ 43,513.00 – Wall Repairs plus additional 40% O/H

$ 81,221.00 – Stove Replacements plus additional 40% O/H

$ 2,500.00 – Refrigerator Replacements, No O/H or profit included

$ 94,525.00 – Carpet, Failure to Maintain plus additional 40% O/H

$ 578,112.00 – Depreciation (includes 50% O/H)

$ 17,359.00– Cost Book, Lack of Approval (includes 50% O/H)

$ 458,078.00 – Additional Payroll (includes 50% O/H)

$ 26,917.00 – Outstanding Overhead & Margin 1998 to May 00

$ 1,347,051.00 – Sub Total

$ 1,969.00 – Additional Overhead (Approx. 40%) for Contracting Officer's Decision (COD) dated October 25, 2007

$ 105,634.00 – Additional Overhead (Approx. 40%) for selected items, this COD

$1,454,654.00 – Total

THE DISPUTE:

North Star requests payment from the Government of $1,887,822.04 consisting of seven major claim areas Parts (A – G) as shown in their claim dated August 23, 2007. North Star also requests Contract Disputes Act (CDA) interest from the date of submission of the claim. The total sum claimed of $1,887,822.04 includes an additional 40% overhead requested for Part B and Parts D-F of the claim. A partial decision was issued on October 25, 2007 addressing Parts A, B-2 thru B-6, B-12 and B-13, however the request for 40% additional overhead was not decided in the October 25, 2007, decision. Another partial decision was issued on December 7, 2007, addressing Part C, Incentive Fees. This final decision pertains only to the following parts of the claim:

Part B-1, Matching for which North Star alleges the Government improperly required matching of items which were adjacent to replaced items, such as carpeting and countertops.

Part B-8, Wall Repairs for which North Star contends that prior to 2002, the Government required the tenants to perform wall repairs and spackling at each change of occupancy. Beginning in March 2002 the Government no longer required the tenant to perform spackling if the unit was scheduled to receive a full interior painting.

Part B-9, Stoves for which North Star states that from 1999 through 2006, 179 stoves were replaced at Birchwood Estates by North Star. One stove was replaced due to fire damage and the cost was reimbursed by the Government. North Star's site

manager contends that all other stoves were replaced because of significant scratches, burns or chips, not because of unit failure.

Part B-10, Refrigerators for which North Star estimates they have replaced approximately 50 refrigerators between 1997 and 2002. North Star further contends that 10% (five each) of the refrigerators should have been work authorized due to damages caused by the tenants beyond normal wear and tear.

Part B-11, Carpet (failure to maintain) for which North Star estimates that full carpet replacements were completed in 80 housing units due to fair wear and tear (FWT) from 1997 until August of 2002. North Star further estimates that 75% of the carpet replacement was due to lack of care and not following the carpet maintenance instructions as provided to the Government.

Part D, Depreciation for which in accordance with the Opinion of the United States Court of Federal Claims in North Star Alaska Housing Corporation v. The United States, Nos. 98-168C, 02-1632C and 03-2699C, filed April 2, 2007; North Star is entitled to reimbursement for any costs not previously paid to North Star because of the replacement items being depreciated by the Government. North Star contends that all North Star costs billed to the Government between January 2001 and March 2007, not previously paid by the Government, fall into the category of "depreciation" and should be reimbursed to North Star.

Part E, Cost Book Approval for which North Star contends the Government unilaterally altered

the process for preparing work authorizations and improperly removed items from the List of Repair Costs. North Star further contends that the practice of delaying the approval of the List of Repair Costs (Cost Book) damaged North Star resulting in under-billing between Fiscal Year (FY) 2003 and FY 2006.

Part F, Additional Payroll for which North Star contends they have incurred additional payroll costs due to additional accounting and scheduling burdens caused by the Government's stockpiling of units for same day release, failure to provide adequate notice of inspections, failure to provide work authorizations, failure to provide additional time for extensive repair work and improper use of extra-contractual inspections.

Part G, Overhead & Margin 1998 to May 2000 for which North Star contends the Government improperly withheld 10% overhead from 1998 thru May 2000.

Additional 40% Overhead for items: B, D, E & F for which North Star contends their actual overhead costs to be 50% rather than the 10% that was previously requested and justified.

PERTINENT CORRESPONDENCE:

1. Reserved.

2. Letter from North Star (Rhonda Sekyra) to the Contracting Officer (Veronica Hiriams), dated March 4, 2008.

3. Defense Contract Audit Agency (DCAA) Audit Report No. 4201-2008C17200001, dated February 28, 2008.

4. Letter from North Star (Rhonda Sekyra) to DCAA (Nancy Machida), dated February 21, 2008.

5. Overhead Comparables Spreadsheet, obtained January – February 2008.

6. Partial COD, dated October 25, 2007 in Response to North Star's Request for COD, dated August 23, 2007.

7. CDA Claim; Request for COD, dated August 23, 2007.

8. Opinion of the United States Court of Federal Claims (COFC) in North Star Alaska Housing Corporation v. The United States, Nos. 98-168C, 02-1632C and 03-2699C, filed April 2, 2007.

9. Letter from Contracting Officer to Mr. Eldon Wartes accepting 10% Overhead Rate Request, dated February 27, 2003.

10. COD: Profit and Overhead, dated September 9, 1998.

11. North Star's Proposal No. FW0019003, page 27: "Plans for Repair or Replacement of Major Components," to the Government's Request for Proposal No. DACA85-85-R-0019, 1985.

12. Chugach Support Services, Inc. (CSSI) faxed attachment No. 1, Estimated Replacement Cost of Appliances and Life Expectancy.

13. Bank of America, Home buying, Loans, and Lines of Credit, Life Expectancy of Home Appliances, Website.

14. Army Regulation (AR) 420-1, Maintenance and Repair Furnishings, pages 105 – 106.

PERTINENT CONTRACT PROVISIONS:

15. Lease No. DACA85-5-88-17 Exhibit C, Maintenance, Repair and Operational Services Standards Annex.

FINDINGS OF FACT:

Claim B-l: Matching – North Star requests reimbursement of $44,826.00 (plus additional 40% overhead) for flooring and counter tops estimated to have been replaced for the purpose of matching adjacent replacement items for the period of February 2002 through November 2004. On page 85 of the Court's Opinion filed April 2, 2007, North Star is entitled to recover the costs associated with the matching of adjacent replacement items. North Star took random samples from the months of August 2002, October 2003 and September 2004 to establish its estimate that 80% of its billings addressed floorings and countertops. North Star calculated their estimated costs by applying a 5% factor to the 80% estimate. The 5% factor was North Star's estimate of the percentage of the cost billed for flooring and countertop replacements for which the Government denied payment because the replacements did not match adjacent flooring and countertops. North Star then added $16,451.00 derived by applying total unpaid billings between December 2004 and March

2007 to the ratio between the matching cost (combined with smaller dollar specifically identified as unpaid billing amounts) and unpaid North Star billings between February 2002 and November 2004. Ten percent overhead and 10% profit are included in the claimed cost of $44,826.00.

Claim B-8: Wall Repairs – North Star requests reimbursement of $43,513.00 (plus additional 40% overhead) for performance of spackling and wall repairs from 2002 through 2007. Ten percent overhead and 10% profit are included in the claimed cost of $43,513.00. North Star developed the claimed cost by applying an annual rate for spackling wall repair against the number of full interior paint jobs performed between March 2002 and March 2007. North Star contends that prior to FY 2002, the Government required tenants to perform this task and beginning in FY 2002, the Government required North Star to assume this task as part of "paint prep" for interior paints and refused payments on any wall repair billings. According to a Memorandum dated March 11, 2002, signed by Ms. Connie Kiser, the occupants were to continue to pull all nails, but if the unit was scheduled for a full interior painting, they did not have to spackle unless it was determined to be an excess amount (approximately one hour).

Beginning in March 2002, the Government considered spackling to be a part of the preparatory work associated with a full painting.

Claim B-9: Stove Replacements – North Star requests reimbursement of $81,221.00 (plus additional 40% overhead) for 178 stove replacements. Ten percent overhead and 10% profit are included in the claimed cost of $81,221.00. North Star claims the

cost not paid by the Government to replace stoves between FY 1999 and FY 2006 were due to damage by the occupant's lack of attention to maintenance instructions provided to the Government by North Star. None of these stove replacements were previously billed to the Government. North Star stated that the reason no billings were previously submitted to the Government is North Star's belief the Government would not have work authorized. During the DCAA audit process, North Star's stove count by year was compared to notations on its general ledger correlating purchases with specific invoices and no material differences were found. Selected vendor invoices were traced and verified the reasonableness of North Star's count and cost per stove. The bulk of the stove replacements occurred after the 15th year of the lease.

Claim B-10: Refrigerator Replacements – North Star requests reimbursement of $2,500.00 (plus additional 40% overhead) for an estimated five refrigerator replacements at an average cost of $500.00 per unit. North Star estimates that 50 refrigerators were replaced between 1997 and 2002. North Star further estimates that 10% of the 50 refrigerators replaced were due to occupant damages beyond normal wear and tear and should have been work authorized by the Government. It was revealed through the DCAA Audit Report that North Star had not applied the original approved 10% overhead or 10% profit to develop the claimed cost of $2,500.00.

Claim B-11: Carpet (failure to maintain) – North Star requests reimbursement of $94,525.00 (plus additional 40% overhead) for reimbursement of carpet for which North Star believes was purportedly

deemed FWT by the Government, but was actually the result of the Government's failure to repair occupant damage that in later years appeared to be FWT. On page 63 of Judge Allegra's Opinion filed April 2, 2007, it was found that the Government adopted the practice of failing to correct occupant damage so that it would be viewed, upon the next tenant changeover, as normal wear and tear. The period of time claimed for this issue is from 1997 until August 2002. North Star contends that 75% of the carpet replaced as FWT during this time period was replaced due to a lack of care by the occupant and not following the maintenance instructions as provided to the Government. North Star estimates 80 units required carpet replacement between June 1997 and August 2002. North Star further estimates that 75% of the 80 replacements were replaced due to the Government's lack of proper care of the carpet and contends the Government should reimburse them for their estimated replacement costs.

Claim D: Depreciation – North Star requests reimbursement of $578,112.00 (includes 50% overhead) for unpaid billings between January 2001 and March 2007 which North Star contends the Government denied reimbursement based on depreciation and apportionment. Beginning in July 1997, as described on pages 60 and 62 of the Federal Court Opinion filed April 2, 2007, the Government unilaterally implemented a ten-year depreciation schedule to adjust reimbursements for carpet damages due to occupant negligence to reflect the remaining useful life of the carpet. The depreciation schedule and apportionment allocation was extended to billings for vinyl flooring, counter tops and other items. The claimed costs for depreciation are reduced

by amounts claimed under "Matching" (B-1). DCAA performed an audit testing 77 transactions of 21 separate housing units. Upon comparing the documentation in the unit files against the billing records, the auditor noted that North Star categorized all disapproved costs as "depreciation," regardless of the documented reason for disapproval. For instance, although the Army Housing Manager disapproved a portion of billed cost as "not in accordance with approved cost list" and the rest of the billed cost was disapproved as "FWT" item, North Star did not make any distinction between the reasons but considered all "depreciation."

In addition, it was noted that the billings included re-billings of the same work in some of the units tested. Because North Star computed "depreciation" essentially as the difference between billed and approved costs and because North Star did not cull out these re-billings, an initial disapproved billing amount as well as any unpaid amount in the rebilling of the same cost were both included in the claim resulting in doubling up of claimed costs.

Claim E: Cost Book – North Star requests reimbursement of $17,359.00 (includes additional 40% overhead) for delays in the Government's approval of the annual Cost Book and requiring North Star to bill at the old Cost Book rate until the new rates were approved. North Star contends that there were six month delays in approving the price books resulting in North Star under-billing for the first six months of the year. They calculated the claimed total under-billing by applying an average invoice cost percentage increase by year to the sum of billed cost for the first six months of each year

between FY 2003 and FY 2006. There was no indication that North Star re-billed the costs after receiving the new Cost Book.

Claim F: Additional Payroll – North Star requests reimbursement of $458,078.00 (includes 50% overhead) for additional payroll cost beyond normal market salary adjustments as a consequence of the additional accounting and scheduling burdens caused by the Government's "bad faith" practices of stockpiling, failure to provide work authorizations, failure to provide extra time for extensive repairs, and improper use of extra-contractual inspections. North Star further claims they incurred the additional payroll for these reasons beginning in FY 2002 through the first quarter of FY 2007. North Star calculated the claimed cost by applying 50% overhead and 10% profit to the sum of payroll "excess." Pages 15 through 18 of the DCAA audit report explains in detail the process used by North Star to complete their calculations and the auditor's rational for questioning some of North Star's calculations. DCAA questioned $214,229.00 of the $458,078.00 that North Star claims as additional payroll. Questioned costs do not include associated profit in the amount of $21,423.00.

Claim G: Unpaid Overhead and Margin – North Star requests reimbursement of $26,917.00 for unpaid overhead between January 1998 and May 2000. North Star contends that the Government withheld 10% overhead and margin during the years 1998 through May 2000. DCAA was able to substantiate that the Government withheld 10% overhead from 1998 through May 2000. On February 27, 2003, the Contracting Officer approved a ten

percent overhead rate as acceptable and included a calculation of unpaid ten percent overhead on billings back to June 2000. This claim is for the 10% overhead withheld between 1998 and May 2000.

Additional 40% Overhead – North Star requests an additional 40% overhead for their claim in items B, D, E and F. North Star was approved to charge the Government a 10% overhead rate and a 10% profit margin by letter dated February 27, 2003. In accordance with Exhibit C to Lease No. DACA85-5-88-17, Part C-1 (t), List of Repair Costs: "The man-hour requirements will be multiplied by the Department of Labor Service Contract Act Wage Determination rate plus materials at wholesale cost plus reasonable overhead and profit." Research of overhead rates from six other facilities maintenance contractors revealed comparable overhead rates ranging from 10% to 30%. Three of the contractors charged one at 10%, one at 15%, one at 23.34% and one at 30%. Three of these contractors were from the Alaska area and three were from New York 801 Housing lessors.

DCAA has determined through their audit that North Star's actual overhead rate has been running 50%. The reason for the comparably high overhead rate has not been determined. North Star is requesting to recover their actual overhead rate. In North Star's claim, all Section "B" items, except Item B-10: Refrigerators reflect an error in the calculations for the 40% additional overhead. The 40% is taken on top of the sum of the original 10% previously approved overhead and the 10% profit. Item B-10: Refrigerators appears to not reflect either overhead or profit in the claimed amount. Items D:

Depreciation, E: Cost Book and F: Additional Payroll, all reflect sums that already include the total of 50% overhead and 10% profit.

Overhead for all items in Part B have been recalculated to reflect a 50% overhead plus 10% profit. The original 10% overhead and 10% profit were backed out, then 50% overhead calculated on the base cost then 10% profit margin added.

CONCLUSION:

Claim B-l: Matching – In regards to the matching claim for $44,826.00 (plus additional 40% overhead), this claim is based strictly on estimates of flooring and counter top replacements that were required for the purpose to match kind and color of adjacent replaced items and not work authorized for payment by the Government. North Star's methodology of extrapolating and estimating the amount of flooring and counter tops that were replaced for the purpose of matching adjacent replaced items lacks some validity. However, since North Star deducted the entire claimed cost of $44,826.00 from the pool of unpaid billings before computing the claimed costs for Item D "depreciation," the Contracting Officer is willing to accept that this separate claim would have otherwise been submitted as part of claimed Item D "depreciation."

A review of all billings from North Star and work authorizations by the Government from October 2003 through March 2007, were reviewed and no "matching" issues were found. I therefore find that the added cost by North Star of $16,451.0000 for matching during the period of December 2004 and

March 2007 to be invalid. In this regard, I find that North Star should be reimbursed the difference between $44,826.00 and the invalidated $16,451.00 for a sum of $28,375.00 plus an additional 40% overhead, totaling $36,986.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Claim B-8: Wall Repairs – In regards to wall repairs and spackling claim for $43,513.00 (plus additional 40% overhead) from 2002 through end of lease in May 2007, a memorandum signed by Ms. Connie Kiser, dated March 11, 2002, gave instruction that tenants were not required to perform spackle unless more than one hour was required to complete the task. This policy applied to units scheduled for full interior paintings. Full interior paintings as scheduled by the lease were verified as being completed. I find it reasonable that one to two hours of labor would be required to spackle holes in walls of which the tenants were previously required to perform. I, therefore, find that North Star should be reimbursed $43,513.00, plus an additional 40% overhead, totaling $56,719.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007):

Claim B-9: Stoves – In regards to 178 stove replacements, it has been verified that multiple stove purchases were invoiced to North Star and tied to work order request logs. The number of stoves purchased was tied to work orders for stove installations within a reasonable period of the actual purchase. Even though there is substantial evidence that as many as 178 stoves were replaced between FY 1999 and FY 2006, there is not sufficient evidence

that the cause of stove replacements were due to occupant damages beyond normal wear and tear. In accordance with AR 420-1, the normal useful life expectancies of household appliances for non-tropical areas range from seven to 15 years. The Bank of America Home Equity Web site lists the life expectancy of some home components including appliances. Gas ranges have the longest life expectancy of 15 years. Refrigerators are listed as about 13 years. CSSI, contractor for Army Housing at Ft. Richardson, AK, estimates appliance replacement for stoves to be 10 years and refrigerators to be 15 years.

Although not included in the final lease between North Star and the Government, North Star's response, No. FW0019003 to the Government's Request for Proposal No. DACA85-85-R-0019 included "Plans for Repair or Replacement of Major Components" on page 27. This "Plans for Repair or Replacement of Major Components" document listed both stoves and refrigerators with an expected life of 10 years, to be replaced as needed but at least once during the initial 20 year term of the lease. This is an indication of North Star's expectation of the normal useful life of these appliances when used in rental properties. These replacement time schedules are in line with normal industry standards as evidenced in the above paragraph.

It appears reasonable that a significant number of stoves would require replacement by 2003 or after approximately 15 years of scratches, burns and chips through normal wear and tear. It also appears reasonable to the Contracting Officer that a number of stoves intermittently replaced in 1999, 2000 and

2002, could have been replaced before their normal life expectancy of 12 to 15 years in accordance with industry standards, equating to 13 units. It is conceivable that these 13 units may have been replaced due to occupant damages beyond normal wear and tear. Without any evidentiary support contrary to the norm, it is impossible, at this late date, to determine that 178 stoves had to be replaced due to occupant damages beyond normal wear and tear. In this regard, I find that North Star should be reimbursed $5,161.00 as claimed for four stoves in 1999, six stoves in 2000, and three stoves in 2002, plus an additional 40% overhead, totaling $6,727.00, plus CDA interest from August 27, 2007.

Claim B-10: Refrigerators – In regards to the request for replacement of five refrigerators for a total of $2,500.00 (plus an additional 40% overhead), it has been verified by North Star's general ledger that approximately 500 refrigerators were purchased between FY 2000 and FY 2002. Due to the low materiality and the reasonableness of approximately 10% of the replacements being attributed to occupant damages above normal wear and tear, I find that North Star should be reimbursed $2,500.00 plus 50% overhead and 10% profit, totaling $4,125.00, plus CDA interest from August 27, 2007, for the replacement of five refrigerators between 1997 and 2002. The DCAA audit revealed that North Star had not applied overhead or profit to develop the claimed cost of $2,500.00.

Claim B-11: Carpet (Failure to Maintain) – In regards to North Star's claim for reimbursement of $94,525.00 (plus additional 40% overhead) North Star claims that 75% of 80 carpet FWT replacements

between June 1997 and August 2002 were the result of the purported Government's failure to repair occupant damage that in later years appeared to be FWT. There are no billings to the Government or noted evidence to substantiate the claim that 75% of 80 carpet FWT replacements between June 1997 and August 2002 were replaced due to the Government's "lack of care" rather than FWT. It is the Contracting Officer's opinion that North Star has not provided sufficient evidence to support this portion of their claim.

Claim D: Depreciation – In regards to North Star's claim for reimbursement of $578,112.00 (including 50% overhead) for unpaid billings between January 2001 and March 2007 that were denied based on "depreciation," there are discrepancies in the claimed data. DCAA audited 77 transactions involving 21 separate housing units included in this portion of North Star's claim. Upon comparing the documentation in the unit files against the billing records, the auditor noted that North Star categorized all disapproved costs as "depreciation," regardless of the documented reason for disapproval. The 77 transactions tested involved a total dollar amount of $107,194.00. Of the $107,194.00, an amount of $72,994.00 was questioned as suspect. Because North Star computed "depreciation" essentially as the difference between billed and approved costs, and because North Star did not cull out any re-billings, the initial disapproved billing amounts as well as any unpaid amount in the rebilling of the same cost were both included in the claim resulting in doubling up of claimed cost.

As noted in the DCAA Audit Report, these discrepancies cast doubt on the reliability of the billing records. In accordance with the results summary shown on page 13 of the DCAA Audit Report, the questioned costs of the $76,567.00, before additional 40% overhead, were $52,139.00 as follows:

Apportionment -	$ 7,234.00
FWT -	$34,285.00
Not necessary -	$ 798.00
Duplicate-rebilling -	$ 8,886.00
No reason -	$ 234.00
Not billed in acc/cost book -	$ 702.00

Based on pages 60 and 61 of the Federal Court's Opinion filed April 2, 2007, "apportionment" is considered in the same light as "depreciation." In accordance with page 63 of the same Opinion, the Government had a practice of failing to correct occupant damage and later classifying it as fair wear and tear.

In review of the 77 transactions tested by DCAA, the Contracting Officer found that all partial approvals for flooring and countertops were placed into the categories of either "depreciation" or "apportionment." Several requests for payment of flooring were disapproved by the Government and listed as FWT. Of the work authorizations that listed FWT as the reason for disapproval some had notations that there was no need to seal the floors and no detection of urine odor or stains. Other work authorizations listing FWT as the reason for disapproval of carpet reflected approvals for the reimbursement costs for sealing only. It has been

determined that the only reason for the sealing of floors during change of occupancy maintenance is the detection of urine. As a result of this finding and in light of the Federal Court's Opinion, the Contracting Officer is willing to give the benefit of the doubt to North Star where the disapproval for reimbursements of flooring and countertop replacements were listed as FWT. By allowing North Star to include the previously questioned costs of "apportionment" and "FWT" into their "depreciation" billings, this results in 86% or $65,947.00 of the tested $76,567.00 to be substantiated. I, therefore, find that North Star should be reimbursed $497,176.00 (86% of $578,112.00) plus CDA interest from the date of receipt of this COD request (August 27, 2007). The amount of $497,176.00 includes North Star's request for an overhead rate of 50% on the approved reimbursement.

Claim E: Cost Book – In regards to North Star's claim for reimbursement of $17,359.00 (includes additional 40% overhead) due to delay of Cost Book approval, North Star was required to bill cost during a new year using prices from the prior year's Cost Book. North Star has calculated the claimed total under-billing by applying an average invoice cost percentage increase by year to the sum of billed costs for the first six months of each year between FY 2003 and FY 2006. The approval delay for the Cost Books has been verified to be near six months. There appears to be no re-billing at the new approved Cost Book prices after receiving the approval of the new Cost Books. I therefore find that North Star should be reimbursed $17,359.00, which includes an additional 40% overhead, plus CDA interest from the date of receipt of this COD (August 27, 2007).

Claim F: Additional Payroll – North Star requested reimbursement of $458,078.00 (includes 50% overhead), claimed as additional payroll costs beyond normal market salary adjustments as a consequence of the additional accounting and scheduling burdens caused by the Government's practices of stockpiling, failure to provide work authorizations, failure to provide extra time for extensive repairs, and improper use of extra-contractual inspections. Pages 51 through 57 of the Federal Court's Opinion filed April 2, 2007, indicate that some of the Government's actions listed above clearly made it more difficult for North Star to perform their contract and increased their costs. These costs, however, should not be duplicated within the claimed issues or overlapped in compensation awarded to North Star.

Pages 15 through 18 of the DCAA Report discussed in detail the audited process and findings. DCAA questions $214,229.00 of the $458,078.00 claimed, not including the associated 10% profit on the $214, 229.00. By including the 10% profit associated with the $214,229.00, the actual questioned amount is $235,652.00 of the $458,078.00 claimed amount. DCAA determined that the 50% overhead rate is the actual rate and an acceptable rate. DCAA adjusted North Star's calculation to remove all overhead employee salaries and burdens from the computations because any increase in the overhead salaries and burden for the site manager and administrative employees is recouped through applying the 50% overhead rate. DCAA was not convinced that increases in health insurance premiums, payroll processing fees and pension plan fees were related to the Government's "bad faith"

practices and therefore questioned those costs. In regards to the number of hours worked from FY 2000 through FY 2006, DCAA noted that as a general trend, hours worked decreased as salaries and wages increased.

They recomputed the annual increases to apply to the standard year using the average annual increases for salaried direct employees presented by North Star. They then selectively tested the list of salaried employees provided by North Star against W-2 information and found no material differences. Based on these procedures, DCAA then recalculated the excess attributable to increases in direct employee wages and payroll taxes and after applying the 50% overhead expense and ten percent profit, they questioned the difference from the claimed amount. The questioned costs do not include associated profit in the amount of $21,423.00.

After receiving North Star's response, the DCAA auditor believes that North Star's demonstration is based on the same conceptual error reflected in its original calculation of claimed additional payroll. In its demonstration, North Star calculates additional payroll costs based on the sum of direct and indirect hours. A duplication of indirect costs then would occur when North Star applies the overhead rate to these commingled costs. DCAA believes their calculation eliminates this duplication by purifying additional payroll costs to contain only direct costs. This allows North Star to recoup the increase for indirect employee costs through the application of the 50% overhead rate (which already includes salary costs for indirect employees) to the additional direct payroll costs.

I agree with the methodology used by the DCAA auditor in their determination that would allow North Star to recoup the increase for indirect employee costs through the application of the 50% overhead rate to the additional direct payroll costs. I, therefore, find that North Star should be reimbursed $222,426.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007). The $222,426.00 is calculated by subtracting the questioned amount of $214,229.00 plus the associated 10% profit margin of $21,423.00 from the claimed amount of $458,078.00 (includes 50% overhead).

Claim G: Unpaid Overhead and Margin – In regards to the claim for 10% overhead rate for the period of 1998 through May 2000, it was determined by a Contracting Officer's Decision letter, dated September 9, 1998, that no overhead would be paid until North Star submitted financial information supporting its claim for a 10% rate. By Contracting Officer's letter dated February 27, 2003, a 10% overhead rate was approved and calculations provided dating back to June 2000. There was no evidence found reflecting reimbursement to North Star of the 10% overhead for the period of February 1998 through May 2000. I, therefore, find that North Star should be reimbursed $26,917.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Additional 40% Overhead for Parts B-2 thru B-6 – In regards to the additional overhead that was not addressed in the Contracting Officer's Decision dated October 25, 2007, I find that North Star should be reimbursed an additional 40% overhead amount of

$ 1,969.00 on the following items that already include 10% overhead and 10% profit margin:

B-2: Matching Carpet unit 884 – $ 1,674.00

B-3: Carpet & Vinyl Unit 833 – $3,478.00

B-4: Gutter Downspout Unit 638 – $40.00

B-5: Carpet & Counter Unit 961 – $ 1,115.00

B-6: Repainting Bathroom Unit 961 – $179.00

Total = $6,486.00; additional 40% overhead = $1,969.00

In regards to this final COD, North Star is hereby awarded a sum total amount of $870,404.00 for the claims addressed in this COD which includes additional 40% overhead for approved items awarded in the COD, dated October 25, 2007. I further find that COD interest should be paid on the principle amount of $870,404.00 from the date of receipt of this COD request (August 27, 2007) until paid. This decision in no way waives the United States' right to appeal the decision of the COFC in case Nos. 98-168C, 02-1632C and 03-2699C that determined entitlement to some of the claims decided in this document. My determination to pay North Star certain amounts in this document is predicated on the court's determination of entitlement and is subject to a final judgment in those cases. Should any appeal of the court's decisions be successful for the United States, then the quantum determinations contained in this decision will be null and void.

This is the final decision of the Contracting Officer. This decision may be appealed to the Armed Services

Board of Contract Appeals. If you decide to make such an appeal, you must mail or furnish written notice thereof to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, Virginia 22041-3208, within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer, US Army Engineer District, Alaska, P.O Box 0898, Anchorage, Alaska 99506-0898, from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims within 12 months of the date you receive this decision.

The Small Claims Procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount of dispute, as a result of the final decision, is $50,000 or less; and the accelerated procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount in dispute, as a result of this decision is $100,000 or less.

Date:

_____ _____

Veronica A Hiriams
Contracting Officer

APPENDIX H

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
ELMENDORF AFB, ALASKA 99506-0898
Filed: December 7, 2007

Office of Counsel

North Star Alaska Housing Corporation
ATTN: Ms. Rhonda Sekyra
937 Harvard Avenue East
Seattle, WA 98102-4532

Re: Contracts DACA85-1-86-71 (Outlease), DACA85-9-86-27 (Agreement to Lease) and DACA85-5-88-17 (Lease), Fort Wainwright, Alaska

Dear Ms. Sekyra:

Enclosed are my Findings of Fact and Contracting Officer's Decision (COD) regarding the incentive fees in association with the claim for Rent Abatement (years 2002, 2003 and 2005), Matching Carpet Unit 884, Carpet and Vinyl Unit 883, Gutter Downspout Unit 638, Carpet and Counter Unit 961, Repainting Bathroom Unit 961, Water Damage Units 1006, 1229 and 952, and Floor Matching Unit 623 on Fort Wainwright, Alaska.

If you have any questions about the enclosed COD, please contact Ms. Anne L. Burman of our Office of Counsel at (907) 753-2532.

Sincerely,

/s/

Veronica A. Hiriams
Chief, Real Estate Division
Contracting Officer

Enclosure

FINDINGS OF FACT TO ACCOMPANY CONTRACTING OFFICER'S DECISION

Incentive Fees (1995, 1996 & 2002-2006)

CONTRACT NUMBERS:

DACA85-1-86-71 (Outlease)
DACA85-9-86-27 (Agreement to Lease)
DACA85-5-88-17 (Lease)

NAME AND ADDRESS OF CONTRACTOR:

North Star Alaska Housing Corporation
937 Harvard Avenue East
Seattle, WA 98102-4532

CONTRACT DESCRIPTION:

To design and construct 400 family housing units for military personnel and their families on Fort Wainwright, Alaska, pursuant to the Military Construction Authorization Act of 1984, 10 USC § 2828(g), as amended by the Military Construction Authorization Act of 1986, P.L. 99-167, Sec 801.

The outlease is a lease of government property on Fort Wainwright to the developer, beginning on June 27, 1986, for a period of 32 years, subject to termination clauses.

The Agreement to Lease provided for the Government to lease back the property, including the 400 housing units and related structures and improvements, upon completion of the project.

The Lease between North Star Alaska Housing Corporation (hereinafter North Star) and the

Government is for a period of 19 years and six months, beginning November 6, 1987.

CONTRACT AMOUNT:

The contract amount is determined to be the combined annual total of the shelter rent and the maintenance rent costs of the 400 units over the life of the Lease. That amount excludes Work Authorization repairs and utility charges, which are paid separately by the Government. Adjustments are allowed for fluctuations in the costs of maintenance and real estate taxes.

AMOUNT IN DISPUTE:

$10,675.15 - 1995 Incentive Fees

$19,835.80 - 1996 Incentive Fees

$65,326.59 - 2002 Incentive Fees

$66,701.88 - 2003 Incentive Fees

$68,660.63 - 2004 Incentive Fees

$70,306.85 - 2005 Incentive Fees

$36,549.55 - 2006 Incentive Fees

$338,056.45 + CDA Interest

THE DISPUTE:

North Star requested payment from the Government of $1,887,822.04 consisting of seven major claim areas Parts (A - G) as shown in their claim dated August 23, 2007. North Star also

requests Contract Disputes Act (CDA) interest from the date of submission of the claim. The total sum claimed of $1,887,822.04 includes an additional 40 percent overhead requested for Part B and Parts D-F of the claim. A partial decision was issued on October 25, 2007 for Parts A, B-2 thru B-6, B-12 and B-13. This partial decision pertains only to Part C, Incentive Fees for the years of 1995, 1996 and 2002 - 2006. North Star is requesting the maximum incentive fee allowed by the lease (five percent of the annual maintenance rental) for each of the years of 1995, 1996 and 2002 thru 2006 as shown in Part C of their claim dated August 23, 2007.

PERTINENT CORRESPONDENCE:

1. Reserved.

2. Opinion of the United States Court of Federal Claims in North Star Alaska Housing Corporation v. The United States, Nos. 98-168C, 02-1632C and 03-2699C, filed April 2, 2007.

3. CDA Claim; Request for Contracting Officer's Final Decision (COD) dated August 23, 2007; Part C, Incentive Fees.

4. Defendant's Filing of Incentive Fee Decisions, filed with the United States Court of Federal Claims on 21 June 2007.

5. 1995 Incentive Fee Award Correspondence:

November 27, 1995: Letter from Mr. John Stewart to Mr. Don Kinner.

December 1, 1995: Letter from Mr. Dennis Klein to Mr. Dennis Wertz.

December 14, 1995: Memorandum from Mr. Dennis Wertz to Mr. Ed Miller.

December 12, 1995: Memorandum for Record signed by Mr. Klein.

December 16, 1995: Faxed Memo from Mr. Richard Fischer to Mr. Dennis Klein.

January 3, 1996: Letter from Mr. Donald Kinner to Mr. John Stewart.

January 10, 1996: Notice of Award letter from COL Albert J. Kraus to North Star.

January 11, 1996: Letter from Mr. Dennis Wertz to COL Kraus.

January 15, 1996: Correction letter from Mr. Dennis Wertz to COL Kraus.

January 18, 1996: Letter from Mr. Wertz to COL Kraus.

February 14, 1996: Response letter from COL Kraus to Mr. Wertz.

6. 1996 Incentive Fee Award Correspondence:

August 12, 1996: Memo from Tom Petersen to AK Dist. Chief, Real Estate Division.

March 7, 1997: Memo of Record signed by COL WM. David Brown.

April 2, 1997: Memo from Mr. Thomas Petersen to Ms. Karen Goodrich.

April 16, 1997: Notice of Award letter from COL WM. David Brown to Mr. Fischer.

May 22, 1997: Letter from Mr. Fischer to COL WM. David Brown.

May 27, 1997: Letter from Mr. Fischer to COL WM. David Brown.

June 6, 1997: Letter from COL WM. David Brown to Mr. Fischer.

7. 2002 Incentive Fee Award Correspondence:

January 17, 2002: Letter from Rod Everett to Mr. Eldon Wartes.

January 24, 2002: Letter from Mr. Wartes to Rod Everett.

April 10, 2002: Letter from Rod Everett to Mr. Wartes.

April 11, 2002: Letter from Mr. Wartes to Rod Everett.

February 20, 2003: Incentive Fee Decision letter from COL Snodgrass to Mr. Fischer.

March 4, 2003: Letter from Mr. Wartes to COL Snodgrass.

March 24, 2003: Letter from Ms. Barbara Lehman to Mr. Wartes.

March 25, 2003: Letter from Ms. Barbara Lehman to Mr. Wartes.

8. 2003 Incentive Fee Award Correspondence:

January 4, 2004: Memo from Connie Kiser to Mr. Eldon Wartes.

February 6, 2004: Letter from Mr. Wartes to Ms. Kiser.

February 18, 2004: Memo from Ms. Kiser to Mr. Wartes.

February 27, 2004: Non-Verbatim Minutes of meeting signed by Ms. Kiser.

March 2, 2004: Letter from Mr. Wartes to Ms. Kiser.

March 9, 2004: Incentive Fee Decision letter from COL Snodgrass to Mr. Fischer.

March 12, 2004: Letter from Ms. Kiser to Mr. Wartes.

March 18, 2004: Letter from Mr. Wartes to Ms. Kiser.

April 28, 2004: Letter from Mr. Wartes to COL Snodgrass.

July 1, 2004: Letter from Ms. Cynthia Larson to Mr. Eldon Wartes.

August 31, 2004: Letter from Mr. Wartes to Ms. Larson.

9. 2004 Incentive Fee Award Correspondence:

May 19, 2005: Letter from Mr. Wartes to Mr. Lucht.

Jun 13, 2005: Letter from Mr. Lucht to Mr. Wartes.

10. 2005 Incentive Fee Award Correspondence:

June 20, 2006: Incentive Fee Decision letter from COL David Shutt to Mr. Fischer.

11. 2006 Incentive Fee Award Correspondence: None

PERTINENT CONTRACT PROVISIONS:

12. Lease No. DACA85-5-88-17 Article IV, Rent.

13. Lease Exhibit C, Sec. H-4, Incentive Fee Board.

14. Lease Exhibit C, Sec. G-1, Refuse Collection.

15. Lease Exhibit C, Sec. C-1(h), Facility History Files.

16. Lease Exhibit C, Sec. D-5(a), Change of Occupancy Downtime.

17. Lease Exhibit C, Sec. E, Standards for Maintenance of Structures.

18. Lease Exhibit C, Sec. D-2, Contractor Quality Control.

FINDINGS OF FACT:

The lease allows for an incentive fee, for exceptional performance of standards contained in the lease annex, not to exceed five percent of the annual "Maintenance Rental" as determined annually by an Incentive Fee Board. The board will make a determination after the end of the period to grant all, some, or none of the incentive award fee.

1995 Incentive Fee - By letter dated January 10, 1996, the Army Department of Public Works (DPW) Incentive Fee Board awarded North Star $46,268.35 out of the maximum allowable amount of $56,943.50 for the 1995 performance year. This resulted in awarding 4.16 percent of the maximum allowable of five percent. North Star has requested reimbursement of an additional $10,675.15 of

incentive award totaling the full five percent allowable for exceptional performance for 1995. The incentive fee board determined that three and one third quarters of exceptional performance reflected a cooperative effort to mitigate excessive amounts of between occupancy downtime and North Star's efforts in maintenance, management, coordination and customer services. The board decided that North Star's unilateral notification to residents of their intention to provide central trash collection points and the actual elimination of curbside trash pickup services resulted in less than exceptional performance during the last two months of the year.

1996 Incentive Fee - By letter dated April 16, 1997, the Army Incentive Fee Board notified North Star that the 1996 incentive fee award was approved in the amount of $39,000.00, approximately 2/3 of the maximum allowable amount of $58,835.80. The incentive award was based on high ratings in customer service and North Star's overall responsiveness in accomplishing service orders and in the quality of work performed. The only rated areas which were significantly less than exceptional were between occupancy vacancy rates. North Star has requested an additional $19,835.80 of incentive award totaling $58,835.80, the full five percent allowable for exceptional performance for 1996.

2002 Incentive Fee - By letter dated February 20, 2003, the Army Incentive Fee Board notified North Star that no incentive fee was being awarded for the 2002 incentive fee year. Several issues were listed as detractors from the achievement of exceptional performance: The changing out locks with used locksets while charging the government for new

ones, the manner in which the facility history files were kept to include missing documents, instances where two work authorizations were issued for the same work, the lack of a Quality Control Plan to assure accuracy of records, results of resident surveys, lacking of the general maintenance of the buildings including some siding beginning to buckle, paint peeling on garage doors and deteriorating countertops, flooring and appliances. Several letters were written back and forth between members of the Army Housing staff and North Star deliberating the issues listed in the Incentive Award notification letter of February 20, 2003. North Star has requested an incentive fee award of $65,326.59, totaling the full five percent allowable for exceptional performance for 2002.

2003 Incentive Fee - By letter dated March 9, 2004, The Army Incentive Fee Board notified North Star that no incentive fee was being awarded for the 2003 incentive fee year. Several issues were listed as major barriers to an exceptional performance rating: A majority of the units received by the Government after change of occupancy maintenance had unacceptable deficiencies and had to be returned to North Star for corrective action; the same deficiencies found repeatedly in units indicating quality control shortcoming; exterior paint fading, peeling or discolored paint on many of the units; siding beginning to buckle and delaminating; porches deteriorating; paint on garage doors peeling; resident satisfaction surveys not being supportive of exceptional performance; janitorial services in Government office area lacking; complaints of condition of playgrounds, bike paths and common area maintenance. North Star has requested an

incentive fee award of $66,701.88, totaling the full five percent allowable for exceptional performance for 2003.

2004 Incentive Fee - The Contracting Officer has been unsuccessful in obtaining a copy of the undated incentive fee notification letter to North Star signed by Mr. Lucht. It appears the letter would have been sent during the April/May 2005 time frame. In accordance with Mr. Wartes's dispute letter to Mr. Lucht, dated May 19, 2005, the Incentive Fee Board denied any incentive fee for the evaluation period of January 1, 2004 through December 31, 2004. In accordance with this letter, dated May 19, 2005 and Mr. Lucht's response letter, dated June 13, 2005, the issues for not awarding an incentive fee appear to be what the Government considered to be an unacceptably high number of units with discrepancies, inaccurate return dates given by North Star, general maintenance, resident survey results, janitorial services provided at Birchwood and condition of the playgrounds. North Star has requested an incentive fee award of $68,660.63, totaling the maximum of five percent allowable incentive fee award for exceptional performance for 2004.

2005 Incentive Fee - By letter dated June 20, 2006 COL David Shutt notified North Star that the Incentive Fee Board decided no incentive fee would be awarded for the evaluation period of 2005. The Government listed several issues and concerns that were considered in reaching their decision. The same deficiencies were found repeatedly in units after change of occupancy maintenance; only six percent of the units returned to the Government passed the first

inspection and did not have to be redone. The Government felt the lack of an effective Quality Control Plan was costing both parties additional expenditures and resources. A resident survey was used to obtain customer feedback. North Star has requested an incentive fee award of $70,306.85, for exceptional performance during 2005.

2006 Incentive Fee - The Contracting Officer was unable to locate any evidence of an incentive fee decision by the Incentive Fee Board for 2006. North Star has requested an incentive fee award of $36,549.55, for exceptional performance during 2006.

CONCLUSION:

The Contracting Officer has thoroughly reviewed Federal Judge Francis M. Allegra's Opinion issued April 2, 2007. According to the Court's opinion, a host of factors led to the conclusion that the incentive fee decisions must be set aside as arbitrary and capricious. The Court held that the Incentive Fee Board relied upon factors that were not relevant to the established performance standards of the Lease. The Board denied incentive fees, in part, because North Star chose to dispute various interpretations of the Lease (e.g., depreciation and refuse collection) under the dispute resolution clause. The Army relied on resident surveys that were plainly envisioned and designed as a way of denying North Star incentive fees. Other issues used by the Incentive Fee Board in making a final decision that were considered inappropriate by the Court are listed as depreciation issues, lockset issue that was resolved in 2000, rent deductions for change of occupancy downtime and failure to attend inspections.

After review of all pertinent correspondence and after disregarding any depreciation issues, resident surveys, janitorial service issues, failure to attend inspections and lockset issues; I conclude the following:

1995 Incentive Fee - I find that an annual incentive fee may be awarded for exceptional performance of standards contained in the lease. The only issue cited to be less than exceptional performance by North Star during this period was the unilateral notification to residents of North Star's intention to eliminate curbside trash collection service and the creation of a central trash collection point. The court found, in its April 2, 2007 Opinion, that it was inappropriate to deny incentive fees because North Star chose to dispute various interpretations of the Lease and the 1995 settlement agreement. I therefore find that North Star should receive a full 100 percent of the allowable incentive fee for 1995. 1 award an additional $10,675.00 to North Star for the 1995 incentive fee year.

1996 Incentive Fee - I find that an annual incentive fee may be awarded for exceptional performance of standards contained in the lease. Exhibit C, Sec. D-5(a) of the lease allows for three days of change of occupancy down time for each unit. Exhibit C, Sec. D-7(d)(l) of the lease requires all change of occupancy work to be completed within three working days after the unit becomes available, which shall be determined from the date the unit is turned over to the Developer by the Government for change of occupancy work. The Army notified North Star on July 10, 1996 during an Incentive Award Meeting that they would be issuing quarters in

groups of eight so as to control the number of units issued within each five-day period. The court found in its April 2, 2007 Opinion, that stockpiling of units and issuing in groups was inappropriate and caused a hardship on North Star. During the months prior to the July 10, 1996 meeting and prior to any stockpiling of units, the average change of occupancy turnaround time was between 10 and 12.5 days per unit. Even by interpreting these lease provisions to mean an aggregate of three days times the number of units issued in a month downtime averages of 10 - 12.5 days per unit for change of occupancy maintenance was excessive and would not be considered as exceptional performance. I find the incentive fee award of $39,000, approximately 2/3 of the maximum allowable amount of $58,835.80, to be fair and equitable. I find no further evidence that would warrant an additional incentive fee award for 1996.

2002 - 2004 Incentive Fees - I find evidence that there was at least some lack of quality control and maintenance of the exterior of the units in accordance with Exhibit C, Sec. E., Standards for Maintenance of Structures. The lack of maintenance of the exterior of the buildings, resulting in paint fading and peeling; siding buckling and delaminating; garage doors peeling and porches deteriorating, are examples of less than excellent performance of this Section of the lease. These same maintenance shortfalls continued to be mentioned by the Board from 2002 thru 2004. I therefore find that an annual incentive fee award of 75 percent of the maximum allowable is proper for each of the years 2002 thru 2004. I therefore award incentive fee amounts for the years 2002 thru 2004 as follows:

2002 - $48,994.94

2003 - $50,026.41

2004 - $51,495.47

2005 Incentive Fee - After careful review of the notice of incentive fee letter from COL Shutt to Mr. Wartes dated June 20, 2006, notwithstanding the issues decided by the court to be arbitrary and capricious, I find no evidence of North Star's performance that would detract from a full incentive fee award for 2005. I therefore award the amount of $70,306.85 for 2005.

2006 Incentive Fee - There was no evidence found of any shortfalls on North Star's performance that would detract from a full incentive fee award for 2006. I therefore award the requested amount of $36,549.55 for 2006.

In regards to this COD concerning Incentive Fees, North Star is hereby awarded a sum total amount of $268,048.22 for the claims addressed in this COD. I further find that CDA interest should be paid on the principle amount of $268,048.22 from the date of receipt of this COD request (August 27, 2007) until paid. This decision in no way waives the United States' right to appeal the decision of the Court of Federal Claims in cases numbered 98-168C, 02-1632C and 03-2699 that determined entitlement to some of the claims decided in this document. My determination to pay North Star certain amounts in this document is predicated on the court's determination of entitlement and is subject to a final judgment in those cases. Should any appeal of the court's decisions be successful for the United States,

then the quantum determinations contained in this decision will be null and void.

This is the final decision of the Contracting Officer. This decision may be appealed to the Armed Services Board of Contract Appeals. If you decide to make such an appeal, you must mail or furnish written notice thereof to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, Virginia 22041-3208, within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer, US Army Engineer District, Alaska, P.O. Box 0898, Anchorage, Alaska 99506-0898, from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims within 12 months of the date you receive this decision.

The Small Claims Procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount of dispute, as a result of the final decision, is $50,000 or less; and the accelerated procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount in dispute, as a result of this decision is $100,000 or less.

Date: _____ _____

Veronica A Hiriams
Contracting Officer

APPENDIX I

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
ELMENDORF AFB, ALASKA 99506-0898
CERTIFIED MAIL
October 25, 2007

Office of Counsel

North Star Alaska Housing Corporation
ATTN: Ms. Rhonda Sekyra
937 Harvard Avenue East
Seattle, WA 98102-4532

Re: Contracts DACA85-1-86-71 (Outlease), DACA85-9-86-27 (Agreement to Lease) and DACA85-5-88-17 (Lease), Fort Wainwright, Alaska

Dear Ms. Sekyra:

Enclosed are my Findings of Fact and Contracting Officer's Decision (COD) regarding the claim for Rent Abatement (years 2002, 2003 and 2005), Matching Carpet Unit 884, Carpet and Vinyl Unit 883, Gutter Downspout Unit 638, Carpet and Counter Unit 961, Repainting Bathroom Unit 961, Water Damage Units 1006,1229 and 952, and Floor Matching Unit 623 on Fort Wainwright, Alaska.

Originally I hoped to complete my assessment of the incentive fees claims in this decision. Unfortunately, more time is needed to complete a fair and impartial assessment of the claim. I will issue a COD on incentive claims on 30 November 2007.

If you have any questions about the enclosed COD, please contact Ms. Anne L. Burman of our Office of Counsel at (907) 753-2532.

Sincerely,

/s/

Veronica A. Hiriams
Chief, Real Estate Division
Contracting Officer

Enclosure

Copy Furnished:

CEPOA-RE (Official Contract File)

FINDINGS OF FACT TO ACCOMPANY CONTRACTING OFFICER'S DECISION

Rent Abatement (years 2002, 2003 & 2005)
Matching Carpet Unit 884
Carpet & Vinyl Unit 833
Gutter Downspout Unit 638
Carpet & Counter Unit 961
Repainting Bathroom Unit 961
Water Damage Units 1006, 1229 and 952
Floor Matching Unit 623

CONTRACT NUMBERS:

DACA85-1-86-71 (Outlease)

DACA85-9-86-27 (Agreement to Lease)

DACA85-5-88-17 (Lease)

NAME AND ADDRESS OF CONTRACTOR:

North Star Alaska Housing Corporation
937 Harvard Avenue East
Seattle, WA 98102-4532

CONTRACT DESCRIPTION:

To design and construct 400 family housing units for military personnel and their families on Fort Wainwright, Alaska, pursuant to the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g), as amended by the Military Construction Authorization Act of 1986, P.L. 99-167, Sec 801.

The outlease is a lease of government property on Fort Wainwright to the developer, beginning on June

27, 1986, for a period of 32 years, subject to termination clauses.

The Agreement to Lease provided for the Government to lease back the property, including the 400 housing units and related structures and improvements, upon completion of the project.

The Lease between North Star Alaska Housing Corporation (hereinafter North Star) and the Government is for a period of 19 years and six months, beginning November 6, 1987.

CONTRACT AMOUNT:

The contract amount is determined to be the combined annual total of the shelter rent and the maintenance rent costs of the 400 units over the life of the Lease. That amount excludes Work Authorization repairs and utility charges, which are paid separately by the Government. Adjustments are allowed for fluctuations in the costs of maintenance and real estate taxes.

AMOUNT IN DISPUTE:	$ 59,394.37	- Rent Abatement
	$ 1,674.00	- Matching Carpet Unit 884
	$ 3,478.00	- Carpet & Vinyl Unit 833
	$ 40.00	- Gutter Downspout Unit 638
	$ 1,386.00	- Carpet and Counter Top Unit 961
	$ 179.00	- Repainting Bathroom in Unit 961
	$ 18,308.00	- Water Damage Units 1006, 1229 & 952
	$ 1,183.00	- Floor Matching Unit 623
	$ 85,642.37+ 40% additional overhead on $26,248.00 + Interest	

THE DISPUTE:

North Star requests payment from the Government of $1,887,822.04 consisting of seven major claim areas (Parts A - G) as shown in their claim dated August 23, 2007. North Star also requests Contract Disputes Act (CDA) interest from the date of submission of the claim. The total sum claimed of $ 1,887,822.04 includes an additional 40% overhead requested for Part B and Parts D-F of the claim. This partial decision pertains only to the following parts of the claim:

Part A, Rent Abatement for which North Star alleges the Government improperly assessed liquidated damages during the period of 2002, 2003 and 2005.

Part B-2, Matching Carpet Unit 884 for which North Star contends that replacing blue carpet with brown carpet is acceptable since the blue carpet was no longer available and past practice had allowed the use of brown carpet even though there were other colors of carpet elsewhere in the unit.

Part B-3, Carpet & Vinyl Unit 833 for which North Star contends the replacements were due to occupant damages.

Part B-4, Gutter Downspout Unit 638 for which North Star contends the replacement was due to occupant damage.

Part B-5, Carpet & Counter Top Unit 961 for which North Star contends the occupants had damaged the carpet and counter tops to the extent they should be replaced.

Part B-6, Repainting Bathroom Unit 961 for which North Star contends the bathroom had already been properly painted and did not require a repainting.

Part B-12, Water Damage Units 1006, 1229 & 952 for which North Star contends that the occupant's conduct caused the water damage to Unit 1006, the Government's failure to regularly inspect the vacant unit led to escalation of the damages in Unit 1229, and that water damages to Unit 952 were a result of the Government's failure to inform North Star of a problem with the toilet in the upstairs master bathroom.

Part B-13, Floor Matching Unit 623 for which North Star contends that the carpet replaced by the Government's contractor was not compatible in kind and color with the adjacent carpet.

PERTINENT CORRESPONDENCE:

1. Reserved.

2. Reserved.

3. Opinion of the United States Court of Federal Claims in North Star Alaska Housing Corporation v. The United States, Nos. 98-168C, 02-1632C and 03-2699C, filed April 2, 2007.

4. CDA Claim; Request for Contracting Officer's Final Decision (COD) dated August 23, 2007; Parts A, B-2 thru B-6, B-12, and B-13.

5. CDA Claim; Request for COD, dated August 23, 2007, Letter of Transmittal.

6. COD, dated September 23, 2005, Water Damaged Unit 1006.

7. COD, dated September 26, 2005, Water Damaged Unit 1229.

8. Request for COD, dated August 11, 2003; Gutter Downspout Unit 638 and letter response dated September 22, 2003.

9. COD, dated September 29, 2003, Re-painting of Bathroom Unit 961.

10. COD, dated August 11, 2003, Carpet and Counter Top Unit 961.

11. COD, dated December 16, 2002, Carpet & Vinyl Unit 833.

12. COD, dated October 23, 2002, Matching Carpet Unit 884.

PERTINENT CONTRACT

PROVISIONS:

13. Lease Exhibit C, Sec. C. 1(s), Damages Caused by Occupants.

14. Lease Exhibit C, Sec. C. 1(w), Major Unforeseen, Unscheduled Work.

15. Lease Exhibit C, Sec. E. 8(c), Workmanship.

16. Lease Exhibit C, Sec. H.1(c) and H.1(d).

FINDINGS OF FACT:

Rent Abatement - North Star has requested reimbursement for actual amount of rent reductions of monthly rent withheld by the Government and not awarded in the Court's Opinion filed April 2, 2007 or

claimed in the '04 and '05 cases. This request is for an amount of $59,394.37, plus interest for the periods as depicted in the Chart attached as Part A of the claim dated August 23, 2007.

Beginning in 2002, the Government invoked Sections H.1.(c) and H.1.(d) of the Maintenance Annex to the Lease, assessing liquidated damages against North Star for each calendar day in excess of the allowable change of occupancy downtime. As stated on page 64 of the Court's Opinion filed 2 April 2007, in the court's view, these assessments cannot stand. Also on page 85 of the Court's Opinion, North Star is entitled to recover the costs associated with rent abatements.

It appears that the first two rent abatements (August 2005 and July 2005 totaling $3,406.28), listed in the chart of Part A of the Request for COD, relate to liquidated damages taken by the Government for downtime due to flood repairs of Units 1006 and 1229. COD for flood damage repairs of Units 1006 and 1229 were sent to North Star on September 26, 2005. The remainder of the rent abatements listed in Part A of the COD request dated August 23, 2007 (totaling $55,988.09) were a direct result of what the Government considered to be excess change of occupancy downtime.

Matching Carpet Unit 884 - North Star has requested reimbursement to replace carpet in Unit 884 for the sole purpose of matching kind and color of adjacent carpet. Costs claimed are $1,674.00 (including 10% overhead and 10% profit), plus an additional 40% overhead, plus CDA interest from date of submission of this claim. North Star originally requested reimbursement for this carpet replacement

by COD request dated October 23, 2002. The COD dated November 20, 2002 found that North Star had the option of either replacing the damaged carpet with blue carpet that was compatible with the adjacent undamaged carpet, or replacing the undamaged carpet with the same brown carpet used to replace the damaged carpet. Page 69 of the Court's Opinion finds that the Army was responsible for the cost of replacing the carpeting in Unit 884.

Carpet & Vinyl Unit 833 - North Star has requested reimbursement to replace damaged carpet and vinyl in Unit 833. Costs claimed are $3,478.00 (including 10% overhead and 10% profit), plus an additional 40% overhead, plus CDA interest from date of submission of this claim. North Star originally requested reimbursement for this flooring replacement by a COD request dated December 16, 2002. The COD dated February 14, 2003 found North Star to be financially responsible for the replacement of flooring due to cracks in the vinyl and failure of previous repairs to the carpet as well as the age of the flooring. Page 70 of the Court's Opinion finds that the Army, and not North Star, should be responsible for the cost.

Gutter Downspout Unit 638 - North Star has requested reimbursement to replace a damaged gutter down spout for Unit 638. Costs claimed are $40.00 (including 10% overhead and 10% profit), plus an additional 40% overhead, plus CD A interest from date of submission of this claim. North Star originally requested reimbursement for this replacement by a COD request dated August 11, 2003. By letter dated September 22, 2003, the Contracting Officer declined a decision stating this issue, among others, was

pending before the Court of Federal Claims (COFC). Page 85 of the Court's Opinion reflects that North Star is entitled to declaratory relief regarding the gutter down spout in Unit 638.

Carpet and Counter Top Unit 961 - North Star has requested reimbursement for damaged carpet and counter top in Unit 961. Costs claimed are $1,386.00 (including 10% profit and 10% overhead), plus an additional 40% overhead, plus CDA interest from date of submission of this claim. North Star originally requested reimbursement for this replacement by COD request dated August 11, 2003. By letters dated September 22, 2003 and October 21, 2003, the Contracting Officer declined a decision stating this issue was pending before the COFC. Page 91 of the Court's Opinion reflects that jurisdiction is lacking for monetary claims on this issue.

Repaint Bathroom Unit 961 - North Star has requested reimbursement for the costs associated with repainting the bathrooms in Unit 961. Costs claimed are $179.00 (including 10% overhead and 10% profit), plus an additional 40% overhead, plus CDA interest from date of submission of this claim. North Star originally requested a COD with regards to financial responsibility for repainting the bathrooms by a COD request dated August 11, 2003. The Contracting Officer rendered a decision on September 29, 2003, stating that North Star had the financial responsibility for repainting the bathrooms. Page 85 of the Court's Opinion reflects that North Star is entitled to declaratory relief regarding the repainting of bathrooms in Unit 961.

Water Damage Units 1006, 1229 and 952 - North Star has requested reimbursement for costs

associated with water damage repairs to these three units. Costs claimed for all three units total $18,308.00; (including 10% overhead and 10% profit), plus an additional 40% overhead, plus CDA interest from date of submission of this claim. A COD concerning Unit 1006 was signed on September 23, 2005 and mailed on September 26, 2005. The disputed amount totaled $16,473.92 ($1,922.90 rent reduction + $14,551.02 repair cost). The Contracting Officer (CO) found neither the Government nor the occupant at fault and denied the claim. A COD concerning Unit 1229 was signed and mailed on September 26, 2005. The disputed amount totaled $4,546.05 ($1,483.38 rent reduction + $3,062.67 repair cost). The CO found neither the Government nor the occupant at fault and denied the claim. The CDA which governs both of these claims required North Star to appeal these decisions either to the Armed Forces Board of Contract Appeals (ASBCA) within 90 days or to the COFC within 12 months. A COD concerning Unit 952 water damages was signed on March 19, 2004. The disputed amount was not specified in the request for COD. This COD was appealed to the COFC in the 2004 Case No. 04-1396C and is addressed in the Settlement Agreement signed September 26, 2007.

Floor Matching Unit 623 - North Star has requested reimbursement for costs to replace carpet that was installed by the Government's contractor and which North Star believes did not match existing carpet in kind and color. Costs claimed for this unit total $1,183.00 (including 10% overhead and 10% profit) plus an additional 40% overhead, plus CDA interest from date of submission of this claim. A COD denying North Star's claim was issued on October 29,

2004. The COD was appealed to the COFC in the 2005 Case No. 05-930C and is addressed in the Settlement Agreement signed September 26, 2007.

CONCLUSION:

Rent Abatement – In regards to the statements of the Court's Opinion, dated April 2, 2007, on page 64, "In the court's view, these assessments cannot stand," and page 85, "plaintiff is entitled to recover the costs associated with rent abatements (liquidated damages)," it is believed by the CO that these statements refer to the rent abatements collected by the Government as liquidated damages associated with what the Government believed to be excess down time for change of occupancy maintenance. Evidence shows that the first two line items listed in the Rent Abatement chart under Part A of this claim relate to liquidated damages taken by the Government for downtime due to flood repairs of Units 1006 and 1229. The COD dated September 23 and September 26, 2005 found neither the occupant nor the Government at fault for the flooding. The CDA which governs these two claims required North Star to appeal these decisions either to the ASBCA within 90 days or to the COFC within 12 months. The claims arising from Units 1006 and 1229 were not part of any of the complaints filed in the court. Thus, the time period to appeal these two has lapsed. I therefore have no authority to further rule on these two previous CODs. However, in accordance with the Court's Opinion dated April 2, 2007, I find that the remainder of the rent abatements listed in Part A of this request for COD were a direct result of what the Government considered to be excess change of occupancy downtime. I therefore find that North Star

should be reimbursed $55,988.09, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Matching Carpet Unit 884 - In accordance with page 69 of the Court's Opinion dated April 2, 2007, the Army was responsible for the cost of replacing the carpeting in Unit 884. I could find no evidence of previous billings by North Star to the Army for this carpeting, however in comparison to carpet replacement billings for other similar Units, the amount of $1,674.00 appears reasonable. I therefore find that North Star should be reimbursed $1,674.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Carpet & Vinyl Unit 833 - In accordance with page 70 of the Court's Opinion dated April 2, 2007, the Army should have been responsible for the cost when the carpet and vinyl were replaced. In accordance with the previous bills on file with the Army and the approved 2002 list of repair costs (price book), I find the claimed amount of $3,478.00 to be reasonable. I therefore find that North Star should be reimbursed $3,478.00, plus CDA interest from the date of receipt of this COD (August 27, 2007).

Gutter Downspout Unit 638 - In accordance with page 85 of the Court's Opinion dated April 2, 2007, the plaintiff is entitled to declarations regarding the gutter down spout in Unit 638. I therefore find that North Star should be reimbursed $40.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Carpet & Counter Unit 961 - In accordance with page 91 of the Court's Opinion dated April 2, 2007,

jurisdiction is lacking for monetary claims. According to the previous billings on file with the Army, I find the claimed amount of $1,386.00 to be reasonable. The Army's unit files, however, show evidence that two amounts were previously authorized for payment when this bill was submitted by North Star in July 2003. The $196.20 was authorized for carpet and $74.54 was authorized for carpet installation on July 12, 2003. This previous payment of $270.74 should be deducted from the total amount of $1,386.00. I therefore find that North Star should be reimbursed $1,115.26, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Repainting Bathroom Unit 961 - In accordance with page 85 of the Court's Opinion dated April 2, 2007, the plaintiff is entitled to declarations regarding the repainting of Unit 961. I therefore find that North Star should be reimbursed $179.00, plus CDA interest from the date of receipt of this COD request (August 27, 2007).

Water Damage Units 1006, 1229 and 952 - In regards to water damage to Units 1006 and 1229, CODs were issued dated 23 September and 26 September 2005. The CDA which governs these claims required North Star to appeal these decisions either to the ASBCA within 90 days or to the COFC within 12 months. The claims arising from Units 1006 and 1229 were not part of any of the complaints previously filed in the court. The time period to appeal these two CODs has lapsed. The CO is without authority to make any further decisions in regards to water damage of Units 1006 and 1229. In regards to Unit 952, this is part of the 2004 Case No. 04-1396C and is addressed in the Settlement

Agreement signed on September 26, 2007. No further action will be taken by the CO on Unit 952.

Floor Matching Unit 623 - This issue is part of the 2005 Case No. 05-930C and is also addressed in the Settlement Agreement signed on September 26, 2007. No further action will be taken by the CO on Unit 623.

In regards to this partial COD, North Star is hereby awarded a sum total amount of $62,474.35 for the claims addressed in this COD. I further find that CDA interest should be paid on the principle amount of $62,474.35 from the date of receipt of this COD request (August 27, 2007) until paid. This decision in no way waives the United States' right to appeal the decision of the Court of Federal Claims in cases numbered 98-168C, 02-1632C and 03-2699 that determined entitlement to some of the claims decided in this document. My determination to pay North Star certain amounts in this document is predicated on the court's determination of entitlement and is subject to a final judgment in those cases. Should any appeal of the court's decisions be successful for the United States, then the quantum determinations contained in this decision will be null and void. North Star's request for an additional 40% overhead will be addressed in a separate COD that will respond to the additional 40% overhead request for Parts B, D, E and F of North Star's COD request dated August 23, 2007.

This is the final decision of the Contracting Officer. This decision may be appealed to the Armed Services Board of Contract Appeals. If you decide to make such an appeal, you must mail or furnish written notice thereof to the Armed Services Board of

Contract Appeals, Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, Virginia 22041-3208, within 90 days from the date you receive this decision. A copy thereof shall be furnished lo the Contracting Officer, US Army Engineer District, Alaska, P.O Box 0898, Anchorage, Alaska 99506-0898, from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims within 12 months of the date you receive this decision.

The Small Claims Procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount of dispute, as a result of the final decision, is $50,000 or less; and the accelerated procedure of the Armed Services Board of Contract Appeals shall be applicable, at the sole discretion of the Contractor, in the event the amount in dispute, as a result of this decision is $100,000 or less.

Date:

_____ _____

Veronica Hiriams
Contracting Officer

APPENDIX J

The Contract Disputes Act, 41 U.S.C. §§ 601-613, provides, in relevant part:

Section 602: Applicability of Law

(a) Executive Agency Contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for-

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

41 U.S.C. § 602(a).

* * * *

Section 605: Decision by Contracting Officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor

relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a

contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

(d) Alternative means of dispute resolution

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of Title 5, or other mutually agreeable procedures, for resolving claims. The contractor shall certify the claim when required to do so as provided under subsection (c)(1) of this section or as otherwise required by law. All provisions of subchapter IV of chapter 5 of Title 5 shall apply to such alternative means of dispute resolution.

(e) Termination of authority to engage in alternative means of dispute resolution; savings provision

In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of Title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

41 U.S.C. § 605.

* * * *

Section 606: Contractor's Right of Appeal to Board of Contract Appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

41 U.S.C. § 606

* * * *

Section 607: Agency Boards of Contract Appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) An Armed Services Board of Contract Appeals may be established within the Department of Defense when the Secretary of Defense, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) The members of the Armed Services Board of Contract Appeals shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5 with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of such Board serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of such Board shall be designated by the Secretary of Defense from members so appointed. Compensation for the chairman, the vice chairman, and all other members of such Board shall be determined under section 5372a of Title 5.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of Title 5 for each day they are engaged in the actual performance of their duties as members of the board.

(c) Appeals; inter-agency arrangements

There is established an agency board of contract appeals to be known as the "Postal Service Board of Contract Appeals". Such board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract

made by either agency. Such board shall consist of judges appointed by the Postmaster General who shall meet the qualifications of and serve in the same manner as members of the Civilian Board of Contract Appeals. This chapter shall apply to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board.

(d) Jurisdiction

The Armed Services Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency. Each other agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that--

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval

of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that--

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of the decision in any case.

(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13 of Title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

41 U.S.C. § 607.

* * * *

Section 609: Judicial Review of Board Decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and

conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or

more but fewer than all of the claims, portions thereof, or parties.

(f) Advisory opinions

(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

41 U.S.C. § 609.

No. 10-122

In the Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the trial court's denial of bad-faith attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b).

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In the Supreme Court of the United States

No. 10-122

NORTH STAR ALASKA HOUSING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 4a-5a) is not published in the *Federal Reporter* but is reprinted in 356 Fed. Appx. 415. The order of the Court of Federal Claims (Pet. App. 6a-20a) regarding attorney fees is reported at 85 Fed. Cl. 241.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2009. A petition for rehearing was denied on March 22, 2010 (Pet. App. 1a-3a). On June 9, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 20, 2010, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1980s, the United States Army Corps of Engineers (Army) awarded to petitioner a series of long-term contracts concerning a 400-unit Army housing project at Fort Wainwright, Alaska. Pet. App. 27a. The parties initially "enjoyed a positive working relationship." *Id.* at 46a. Beginning in the mid-1990s, however, several disputes arose concerning the parties' contractual obligations. *Id.* at 48a-49a; see *id.* at 48a-87a. Petitioner sought relief under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, by submitting certified claims to designated contracting officers.

2. In 1998, petitioner filed this contract action in the Court of Federal Claims (CFC). Pet. App. 87a. In April 2002, petitioner updated and amended its complaint. *Id.* at 88a. The CFC tried the case and, in April 2007, issued an opinion. *Id.* at 24a, 89a.

a. The CFC's April 2007 opinion resolved most of petitioner's claims. Pet. App. 24a-191a. *Inter alia*, the court concluded that certain Army representatives had breached the government's covenant of good faith and fair dealing under petitioner's contracts by taking actions calculated to hinder petitioner's contract performance. *Id.* at 106a-107a, 115a-157a. The court stated that petitioner was "not entirely blameless in this matter," but it concluded that petitioner's shortcomings did not justify the officials' bad-faith response. *Id.* at 181a.

The CFC also concluded that certain Army officials had attempted to undermine the impartiality of the contracting officers who handled petitioner's administrative CDA claims. Pet. App. 157a-168a. The court found that

the contracting officer from 1997 to 2001 (Dennis Klein) had not been influenced by pressure from those officials. *Id.* at 161a-163a; cf. *id.* at 52a. The court concluded, however, that the contracting officer who arrived in early 2002 (Harold Hopson) had failed properly to perform his duties in certain respects, and that the officer had thereby facilitated the underlying "breach of the covenant of good faith and fair dealing" by failing "to address the bad faith exhibited by other officials." *Id.* at 165a, 167a-168a; see *id.* at 162a-165a & n.70; cf. *id.* at 74a.

Petitioner sought more than $12.5 million in damages, see Pet. App. 96a n.29 (listing petitioner's pre- and post-trial damage claims), and the CFC rejected most of its claims. *Inter alia*, the court rejected petitioner's claim for $8.6 million in alleged damage to the value of the housing project, *id.* at 169a-178a, and it denied most of petitioner's claims to $2.5 million in other various expenses, *id.* at 179a-181a. The CFC remanded one issue concerning contract "incentive fee[s]" to the Army for redetermination. *Id.* at 183a; see *id.* at 144a-148a; see 5/25/2007 Order (clarifying scope of remand).[1]

b. In April 2008, after the Army completed its remand proceedings, the CFC entered a $241,755 final judgment in petitioner's favor. Pet. App. 21a-23a. That judgment awarded petitioner $218,553 in additional incentive fees from 1998-2001; $15,695 for damage caused by a fire in one housing unit; and $7506 for erroneous

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[1] Although the CFC stated that petitioner was "entitled to declarations" regarding certain issues, Pet. App. 182a, the court never entered a declaratory judgment concerning those issues.

rent reductions from 2002. *Id.* at 21a-22a. The government did not appeal from that judgment.[2]

3. a. Petitioner subsequently moved for an award of attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. EAJA includes two separate provisions authorizing attorney fees awards against the United States. See 28 U.S.C. 2412(b) and (d). Petitioner invoked the first of those provisions, Section 2412(b), which as relevant here provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States * * * in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law.

28 U.S.C. 2412(b). Because Section 2412(b) makes the United States liable for attorney fees "to the same extent" as a private litigant "under the common law," the so-called American Rule—under which "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975)—will typically preclude a fee award against the United States under Section 2412(b).

The American Rule, however, is subject to three "narrowly defined" exceptions. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (citation omitted). Under the exception on which petitioner relies, a federal court possesses "inherent power to police itself" by "assess[ing]

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[2] Separate contracting officer decisions have awarded more than $1 million in contract claims in petitioner's favor. Cf. Pet. 7.

attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 45-46 (quoting *Alyeska Pipeline*, 421 U.S. at 258-259). The "underlying rationale" of the "bad-faith exception to the American rule" is "punitive" and is premised upon "vindicat[ing] the District Court's authority over a recalcitrant litigant." *Id.* at 53 (citations omitted). "[T]he imposition of sanctions under the bad-faith exception" at common law thus "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Ibid.*

b. The CFC denied petitioner's motion for EAJA fees. Pet. App. 6a-20a. The court explained that petitioner based its fee request on allegations of bad-faith conduct by (1) a government attorney who had assertedly "exhibited bad faith in the conduct of this litigation" and (2) Army officials who had purportedly "corrupted the [agency's] claim resolution process" by "coercing the contracting officers into denying various contract claims filed by [petitioner]." *Id.* at 10a-11a. The court concluded that neither of those contentions provided a sound basis for a fee award. *Id.* at 11a-20a.

First, the CFC rejected petitioner's argument that the court should award fees based on alleged bad-faith conduct by government counsel during the litigation itself. Pet. App. 11a-13a. Petitioner contended that a specific government attorney had "exhibited bad faith in the conduct of this litigation," both in advising Army officials and in "triggering, or at least promoting, a criminal investigation of [petitioner's] conduct." *Id.* at 11a. The court explained that it had made no finding of bad-faith attorney conduct with respect to either of those aspects of the litigation, *id.* at 11a, 13a, and that petitioner's allegations therefore "lack[ed] the factual

predicates necessary to bring [them] within the bad faith exception to the American Rule," *id.* at 13a.

Second, the CFC rejected petitioner's argument that fees were appropriate because Army officials had "corrupted the administrative claim process." Pet. App. 13a-20a. The court explained that, although the agency claim process "was conducted in bad faith," that improper conduct neither "directly impacted the integrity of the judicial process" nor caused petitioner to incur additional litigation expenses. *Id.* at 18a-19a.

The CFC held that bad-faith fees are not available for a "defendant's bad faith response to a claim for relief after the claim accrues but before the judicial process is formally invoked." Pet. App. 14a (quoting *Centex Corp.* v. *United States*, 486 F.3d 1369, 1372 n.1 (Fed. Cir. 2007)); see *id.* at 13a-17a. The court stated that the Federal Circuit had "left open [this] question" in *Centex*. *Id.* at 13a. The court reasoned, however, that a federal court's "inherent authority" to sanction litigants "is highly limited and exists only to the extent necessary to ensure the proper functioning of the court." *Id.* at 17a. The CFC accordingly determined that the inherent judicial power to award fees should not be used to "punish[] prelitigation conduct that does not significantly impact the integrity of the proceedings before [the court]." *Id.* at 18a.

The CFC further observed that its own merits decision in this case had "rejected much of the relief originally requested by [petitioner] in its [administrative] CDA claims," including "the most dollar-intensive [portion] of its claims." Pet. App. 19a. With respect to "the claims that [the CFC] sustained," the court found no basis for concluding that the government's defense of the agency's decisions was improper. *Ibid.* The court

reasoned that "many, if not all of [petitioner's] claims would have been denied—and, in some instances, should have been denied—even in a perfectly fair [administrative] process." *Id.* at 18a-19a. Based on its view that "virtually all of the claims here would have been denied even in a 'good faith process,'" the CFC held that petitioner could not have "avoided this action and the significant expenditure of judicial resources it entailed" even if no bad-faith conduct had occurred. *Id.* at 19a.

3. a. On appeal, the government identified multiple bases for affirming the denial of attorney fees, two of which are relevant here. First, the government argued that a court's inherent authority to direct a litigant to pay attorney fees as a sanction for bad-faith conduct is based solely on the court's authority to protect its own proceedings. For that reason, the government contended, "a court may not shift fees based solely upon bad faith 'primary conduct'" that occurred before litigation, "that is, the conduct that forms the basis for the substantive claim for [judicial] relief." Gov't C.A. Br. 9; *id.* at 9-12. Second, the government argued that "even if fee shifting [were] available where a defendant forces a plaintiff to go to court to obtain relief," petitioner had failed to establish that it would be entitled to a fee award on that rationale. *Id.* at 13. The government relied on the CFC's finding that even if no bad-faith conduct had occurred, petitioner would not "have avoided this action and the significant expenditure" associated with it. *Ibid.* (citation omitted).

b. The court of appeals affirmed the CFC's judgment without issuing an opinion. Pet. App. 4a-5a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Under 28 U.S.C. 2412(b), the United States is liable for a prevailing party's attorney fees "to the same extent that any other party would be liable under the common law." The CFC correctly held that a private party would not be liable for fees in the circumstances presented here, and the court of appeals correctly affirmed the CFC's judgment. The CFC articulated two independent bases for denying fees. Although the court's first rationale implicates an issue of broad and continuing importance, the second is closely linked to the circumstances of this case.

a. The CFC concluded that a court's inherent power to sanction litigants does not extend to sanctions for a party's pre-litigation, bad-faith "response to [an administrative] claim for relief after the claim accrues but before the judicial process is formally invoked." Pet. App. 14a, 17a-18a. That holding reflects a sound understanding of the limited purpose that bad-faith fee awards are intended to serve. Inherent judicial powers, which arise independently of any authority conferred by rule or statute, exist because they "are necessary to the [court's] exercise of all others." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citations omitted). "Because of their very potency," this Court has emphasized that "inherent powers must be exercised with restraint and discretion." *Id.* at 44.

As with other inherent powers, the "underlying rationale" for bad-faith fee awards is a "punitive" one that enables a court to "vindicate[] [its] authority over a recalcitrant litigant." *Chambers*, 501 U.S. at 53 (citations

omitted). The court may exercise that inherent authority when a litigant either files a court action in bad faith or engages in the bad-faith "conduct of the litigation." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) (citation omitted). The exception therefore "depends * * * on how the parties conduct themselves during the litigation," not on "which party wins the lawsuit." *Chambers*, 501 U.S. at 53.

The Court in *Chambers* concluded that the sanction at issue was imposed for conduct that occurred during the litigation, see 501 U.S. at 54, and it reserved the question whether a federal court has "inherent power to sanction [a litigant] for conduct relating to the underlying [claim]" at issue in a lawsuit, *id.* at 54 n.16. The Court's explanation of the limited scope and purpose of such inherent authority suggests, however, that the inherent power to award attorney fees may be exercised only to police the conduct of litigants *after* court proceedings have begun. Consistent with that understanding, four Members of the Court in *Chambers* concluded that pre-litigation conduct cannot form the basis for an award of bad-faith fees. See *id.* at 59-60 (Scalia, J., dissenting) (concluding that because bad-faith fees can "only be imposed for litigation conduct characterized by bad faith," a litigant's "flagrant, bad-faith breach of contract" lies beyond that power); *id.* at 74 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Souter, J.) (explaining that a court's "inherent authority" does not permit it to sanction "prelitigation primary conduct" because a "court's inherent authority extends only to remedy abuses of the judicial process"). Vesting courts with inherent authority to sanction litigants for conduct taken *before* a court action has begun would untether that exercise of inherent authority from its *raison d'etre*

and would unduly penalize parties for mounting a good-faith (and potentially winning) defense in court to legal claims based on such pre-litigation conduct. If such exemplary sanctions are awarded, they must be awarded as a form of punitive damages under the substantive law concerning the claims at issue.

b. The CFC also concluded that, even if Army officials had not engaged in bad-faith conduct during the agency's CDA claim process, petitioner would not "have avoided this action and the significant expenditure of judicial resources it entailed." Pet. App. 19a. The CFC explained that the relevant sequence of events "suggest[ed] that virtually all the claims here would have been denied even in a 'good faith' process." *Id.* at 18a-19a. Even assuming *arguendo* that "bad faith misconduct outside of court proceedings [is not] categorically exempt from an award of attorneys' fees under the 'bad faith exception' to the 'American Rule'" (Pet. i), petitioner's failure to demonstrate a causal link between the relevant bad faith and the fees it ultimately incurred would provide an independently sufficient basis for the CFC's denial of fees here. That fact-bound aspect of the CFC's decision implicates no legal issue of continuing importance that might warrant this Court's review.

2. a. Petitioner contends (Pet. 20-22) that the judgment below conflicts with four decisions of this Court. Petitioner's reliance on those decisions is misplaced.

In *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), the Court emphasized that it "d[id] not have" before it a typical request for an award of "counsel fees and other expenses entailed by litigation." *Id.* at 530 (citation omitted). Rather, the question in *Vaughan* "concern[ed] damages" that may be awarded in admiralty for the "necessary expenses" of a seamen's claim of "mainte-

nance and cure." *Ibid.* (citation omitted). The "shipowner's liability for maintenance and cure," the Court explained, is "among 'the most pervasive' of all." *Id.* at 532 (citation omitted). In that specific context, the Court held that exemplary damages to compensate a seamen for his counsel fees may be awarded to punish a shipowner for its "callous," "willful and persistent" failure to provide what it "plainly owed [the seaman] under laws that are centuries old." *Id.* at 530-531. This Court accordingly has read *Vaughan* to authorize a form of "punitive damages" as a matter of substantive admiralty law. *Atlantic Sounding Co.* v. *Townsend*, 129 S. Ct. 2561, 2571 & n.5 (2009); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). And although the Court in *Vaughan* confronted pre-litigation acts the offensiveness of which is comparable to the sort of egregious litigation conduct warranting bad-faith fees, *Vaughan* does not itself support the view that courts generally may award attorney fees solely for a party's pre-litigation conduct.

Petitioner's reliance (Pet. 20) on dictum in *Hall* v. *Cole*, 412 U.S. 1 (1973), is likewise misplaced. The Court in *Hall* stated "that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Id.* at 15. But the Court did not decide whether bad-faith fees were warranted; it instead held that the "'common benefit' rationale" (another exception to the American Rule) justified a fee award. *Ibid.* Moreover, *Hall*'s dictum concerning "actions that led to the lawsuit" is far from clear, and may simply reflect that sanctions may be imposed "where the action is filed in bad faith." See *Roadway Express, Inc.*, 447 U.S. at 766 (citing *Hall*, 412 U.S. at 15).

Sullivan v. *Hudson*, 490 U.S. 877 (1989), also does not support petitioner's position. The Court in *Hudson* construed the phrase "civil action * * * for judicial review of agency action" in EAJA's other fee-shifting provision, 28 U.S.C. 2412(d)(1)(A), and concluded that such a civil action can include "remand proceedings before the [agency]" in certain Social Security cases where such proceedings are "intimately tied to the resolution of the judicial action." 490 U.S. at 884, 887-888; see *Shalala* v. *Schaefer*, 509 U.S. 292, 299-300 (1993) (explaining that *Hudson* is "limited to a 'narrow class of qualifying administrative proceedings'" in which the district court remands for further agency proceedings pending the court's entry of final judgment) (quoting *Melkonyan* v. *Sullivan*, 501 U.S. 89, 97 (1991)). That ruling has no application to Section 2412(b), particularly because the agency proceedings in which the government acted in bad faith here ended long before the CFC ordered a limited remand in this case.

Finally, contrary to petitioner's contention (Pet. 21), the court of appeals' disposition of this case does not conflict with this Court's summary affirmance without opinion in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972) (per curiam). A "summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review," *Zobel* v. *Williams*, 457 U.S. 55, 64 n.13 (1982), and is of little precedential force even with respect to "the precise issues necessarily presented and necessarily decided." *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 897 n.2 (1985) (citation omitted); see *Hohn* v. *United States*, 524 U.S. 236, 259-260 (1998) (Scalia, J., dissenting) (such dispositions "carr[y] little more weight than denials of certiorari"). Petitioner itself notes (Pet.

21) that the district court in *Amos* ruled on alternative grounds, and petitioner makes no attempt to show that this Court in *Amos* "necessarily decided" the question presented here.

b. Petitioner contends (Pet. 11-20) that the court of appeals' judgment implicates a three-way circuit split that warrants resolution by this Court. Petitioner relies in part on decisions of the D.C., Fourth, and Eleventh Circuits, which, in petitioner's view, "broadly hold" that attorney fees may be awarded for "bad faith conduct that gives rise to a plaintiff's substantive claim that the defendant violated a clear duty." Pet. 13. Contrary to that contention, the decisions that petitioner cites do not reflect such a "broad" holding. In *Nepera Chemical, Inc.* v. *Sea-Land Service, Inc.*, 794 F.2d 688, 702 (1986), the D.C. Circuit affirmed the *denial* of bad-faith fees. In *American Hospital Ass'n* v. *Sullivan*, 938 F.2d 216, 219-220 (D.C. Cir. 1991), the court approved an attorney-fee award for bad-faith conduct concerning the "[district] court's Stipulation and Order." *Id.* at 220 (citation omitted); see *id.* at 218. If parties agree to a consent order to settle a dispute, subsequent bad-faith conduct concerning that order may well be subject to sanction. But that exercise of inherent judicial power in the context of ongoing judicial proceedings lends no support to petitioner's fee request based on wholly pre-litigation conduct.

Petitioner notes (Pet. 16) that the Fourth Circuit "long ago" concluded that a "defendant's primary conduct underlying [a] claim" may support bad-faith fees. The Fourth Circuit in 1963 appears to have directed the award of attorney fees as an "equitable remedy" in a school desegregation case where the school system evidenced a "pattern of evasion and obstruction." *Bell* v.

School Bd., 321 F.2d 494, 500 (1963). But *Bell* was decided more than a decade before this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which rejected the use of such "equitable powers" as inconsistent with the American Rule. See *id.* at 241. Since that time, the Fourth Circuit has never cited *Bell* to support the award of fees for bad-faith conduct before a suit was filed, and petitioner provides no reason for believing that *Bell* remains good law after *Alyeska Pipeline*. Cf. *Williams* v. *Professional Transp. Inc.*, 294 F.3d 607, 611, 614 (4th Cir. 2002) (reversing bad-faith fee award based on conduct concerning settlement agreement executed to resolve pending litigation before the court).

Maritime Management Inc. v. *United States*, 242 F.3d 1326 (11th Cir. 2001) (per curiam), is inapposite. In *Maritime Management*, the court approved a bad-faith fee award for the government's "filing an incomplete administrative record" in district court in order to "purposefully withh[o]ld negative documents." *Id.* at 1335 & nn.13, 15; see *id.* at 1328-1329 (government submitted and certified in district court "what it characterized as 'the entire Administrative Record'" but later "admitted" that the record was incomplete) (citation omitted). The award was thus supported by bad-faith conduct during the litigation itself.

c. Petitioner argues (Pet. 16-19) that decisions from the Second, Fifth, Sixth, Eighth, and Ninth Circuits show that those courts would conclude that bad-faith fees are available in this case "because the government's [pre-litigation] misconduct compelled petitioner to pursue its claims administratively and in the [CFC]." Petitioner is incorrect.

Several of the decisions that petitioner cites hold that a bad-faith fee award "may not be based on a party's conduct *forming the basis* for [the plaintiff's] substantive claim." *Sanchez* v. *Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (holding that malicious beating by Border Patrol agent giving rise to tort claim could not justify fee award); accord, *e.g.*, *Kerin* v. *USPS*, 218 F.3d 185, 195 (2d Cir. 2000) (remanding to decide whether "decision to defend [court] action * * * was in bad faith"; stating that evidence of pre-litigation conduct may be considered when determining whether "the decision to initiate or defend a lawsuit [in court] was meritless and made for improper purposes"); *Lamb Eng'g & Constr. Co.* v. *Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1435-1437 (8th Cir. 1997) (holding that court's inherent power to assess bad-faith fees does not extend to the "bad faith administration of [a] contract" because that conduct is "pre-litigation conduct upon which the underlying [contract] claim is based"); *Association of Flight Attendants* v. *Horizon Air Indus., Inc.*, 976 F.2d 541, 548-550 (9th Cir. 1992) (finding "no federal appellate authority" for contrary position; holding that violation of statutory duty to negotiate with union could not support bad-faith fee award); *Shimman* v. *International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1231-1233 (6th Cir. 1984) (en banc) ("hold[ing] that the bad faith exception * * * does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim"; reversing fee award based on violations of labor laws), cert. denied, 469 U.S. 1215 (1985).[3] None of

[3] See also, *e g* , *SEC* v. *Zaharcas*, 374 F 3d 624, 626, 630 (8th Cir. 2004) (affirming denial of bad-faith fee award based on the government's decision to file an unsuccessful federal lawsuit because that litigation conduct was not in bad faith); *McLarty* v *United States*, 6 F.3d

those decisions supports petitioner's claim to bad-faith fees.

In holding that a bad-faith fee award "may not be based on a party's conduct forming the basis for [the plaintiff's] substantive claim," courts have occasionally suggested that bad faith "may" be found in "a party's conduct in response to a substantive claim." See, *e.g.*, *Sanchez*, 870 F.2d at 295 (dictum). The import of that observation is unclear, however, since "a party's conduct in response to a substantive claim" could include the party's conduct in the litigation itself. In any event, the statements on which petitioner relies do not reflect *holdings* that could conflict with the Federal Circuit's judgment in this case. In addition, as the CFC held, "the Army's perversion of the [administrative] claims process was an integral part of [petitioner's] argument" on the merits that the government had "breached its covenant of good faith and fair dealing." Pet. App. 19a. Such conduct forming the basis for petitioner's breach-of-contract claim would not warrant an award of bad-faith fees under the foregoing decisions.

The closest petitioner comes to identifying a square circuit conflict is petitioner's contention (Pet. 17) that the Fifth Circuit would approve bad-faith fees for misconduct in agency proceedings. Before this Court in *Chambers* articulated the principles that govern a

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545, 546, 549 (8th Cir. 1993) (affirming denial of bad-faith fee award because "the government's litigating position was substantially justified" and thus in good faith); *Perales* v. *Casillas*, 950 F.2d 1066, 1071-1073 (5th Cir. 1992) (vacating fee award and remanding for reconsideration where purported bad-faith actions were taken after class-action suit was filed in federal court and the magistrate judge concluded that government action in ongoing agency proceedings reflected a "flagrant disregard of th[e] judicial proceeding").

court's inherent authority to impose bad-faith fee awards, the Fifth Circuit approved an award of such fees for misconduct in agency proceedings that preceded district court litigation where, "after suit is filed," the agency determined that the plaintiff's claim was valid, making the "litigation in th[e] case" unnecessary. *Baker* v. *Bowen*, 839 F.2d 1075, 1082 (1988); cf. *Brown* v. *Sullivan*, 916 F.2d 492, 493-494, 496 (9th Cir. 1990) (directing bad-faith fee award for various agency actions taken *after* suit for judicial review was filed in 1981, where the district court repeatedly remanded proceedings to the agency and the agency caused "unnecessary delays" that "necessitated" additional court filings). But the rule announced in *Baker* would not aid petitioner because, as noted, the CFC concluded that petitioner would have incurred the expenses of bringing suit even in the absence of government misconduct. Unlike in *Baker*, moreover, the government defended the agency's decisions in this suit and largely prevailed in the CFC. And perhaps more importantly, the Fifth Circuit has since held in light of *Chambers* that a court's inherent authority to impose sanctions for bad-faith agency conduct does not include "the power to police the administrative courts * * * when those courts do not threaten the [district] court's own judicial authority or proceedings." *FDIC* v. *Maxxam, Inc.*, 523 F.3d 566, 593 & n.146 (2008); see *id.* at 591. Thus, any tension between the judgment below and the Fifth Circuit's pre-*Chambers* decisions would provide no basis for this Court's review.

4. Even if this Court's review were otherwise warranted to determine whether bad-faith attorney-fee awards may be premised on government misconduct in agency proceedings, this case would be an unsuitable vehicle for the Court's consideration of that issue. The

court of appeals affirmed the CFC's denial of fees without issuing an opinion. And the CFC's decision rested on two independent grounds, one of which—*i.e.*, that petitioner's claims would have been denied in the agency proceedings, and petitioner would ultimately have incurred the costs of suit, even if no government misconduct had occurred, Pet. App. 18a-19a—raises no legal issue of broad importance. See pp. 7, 10, *supra*. Thus, even if petitioner had identified a division of authority otherwise warranting review, this Court should await a case in which its resolution of the conflict would affect the outcome of the dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-122

IN THE
Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORP.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that the courts of appeals are irreconcilably divided over whether and when a party's bad faith misconduct outside of proceedings before a court is immune from the court's inherent authority to award attorney's fees. *See* Pet. 11-20. The assertions of the Brief in Opposition (BIO) that certiorari should be denied notwithstanding that this case directly implicates the acknowledged circuit conflict on this "issue of broad and continuing importance," BIO 8, and moreover controls the availability of fees in *all* government contract disputes, lack merit.

1. This case presents a unique opportunity to decide the question presented because the ordinarily fact-bound question whether the charged party actually engaged in misconduct is not contested here. The United States admits that it engaged in a pervasive pattern of gross misconduct, which forced petitioner unnecessarily to litigate its claims and which, as a consequence, wasted the time and resources of the federal judiciary.

The government's initial bad faith acts were "calculated to hinder petitioner's contract performance," BIO 1, and left petitioner no choice but to pursue its rights in the mandatory claims resolution process. Federal law required petitioner to "submit[] certified claims to designated contracting officers," BIO 1 (citing 41 U.S.C. § 601 et seq.), as a prerequisite to its federal court suit. The government acted in bad faith there as well by purposefully "undermin[ing] the impartiality of the contracting officers," *id.*, including with the specific purpose to distort the federal court litigation petitioner

instituted in response, Pet. App. 166a & n.71. It is thus undisputed that "the agency claim process 'was conducted in bad faith'" by the United States, BIO 6 (quoting Pet. App. 18a), conduct that "threatens the integrity of the dispute resolution process." Pet. App. 160a.

2. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court held that such mandatory administrative proceedings should be treated as part of the litigation for purposes of court-awarded attorney's fees. The government's reliance on the fact that the claim for fees in *Sullivan* technically arose under a different provision of the Equal Access to Justice Act (EAJA), *see* BIO 12, ignores the far broader basis for this Court's holding: "Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." *Sullivan*, 490 U.S. at 888 (citing decisions under the attorney's fees provisions of the Clean Air Act, Title VII, and 42 U.S.C. § 1988). That holding was not limited to one statutory provision but instead followed from "the very purposes behind the EAJA itself": "to diminish the deterrent effect of seeking review of, or defending against, governmental action." *Id.* at 890. It makes no sense to believe that Congress intended to leave such an important gap in the critical incentives created by EAJA for the government to conduct itself fairly in the adjudication of parties' claims.

The United States notably does not dispute that the government contracting system perfectly fits the model of an "interlocking system of judicial and administrative avenues to relief" for which a party may be eligible for fees arising from its opponent's bad faith misconduct in administrative proceedings. *Sullivan*, 490 U.S. at 889. The contracting officer is a "quasi-judicial official," John Cibinic, Jr., et al., *Administration of Government Contracts* 1286 (4th ed. 2006), who has the duty to provide "impartial, fair, and equitable treatment," 48 C.F.R. § 1.602-2(b), and whose decision is a prerequisite to federal court review. Indeed, as the petition explains, at 24-25, the importance of this case is substantially heightened by the fact that, by deeming the *entire* contracting officer process immune as a matter of law from the deterrent effect of a fee award for misconduct, the decision below presents a material threat to the government contracting system. At the very least, contractors will pass through the costs arising from the increased risk that the government will in bad faith abuse the mandatory process for resolving contracting disputes.

3. The government's two arguments that this case is a poor vehicle in which to review the question presented are unpersuasive. *First*, the United States's assertion that "the CFC rejected most of [petitioner's] claims," BIO 2, is seriously misleading to the extent it suggests that petitioner lost on the *substance* of most of its claims. As the petition explained, at 6-7, and the charts appended to this Reply demonstrate, petitioner prevailed on the substantial majority of its claims. Petitioner presented thirty-five claims and prevailed on twenty-six – more than two-thirds. The CFC adjudicated

eleven claims in petitioner's favor, awarding roughly $250,000 in damages. App. A. The CFC also made a variety of specific determinations about petitioner's rights. On that basis, petitioner on remand prevailed on a further sixteen claims that the CFC did not itself resolve in the first instance, for which petitioner was awarded an additional $1.6 million. App. B; BIO 4 n.2.

The CFC instead far more narrowly rejected petitioner's calculation of certain of petitioner's "alleged damage[s]." BIO 2. Although the CFC agreed with petitioner that the government breached the parties' contracts, the court declined to adopt petitioner's damages model. The CFC thus explained, after acknowledging the square circuit conflict over the question presented and adopting the rule at one "end of the spectrum" that "fee shifting can never be based upon 'bad faith' conduct that solely predates the litigation":

> Under this narrower view of the 'bad faith' exception [adopted by the court], the Army's "bad faith" conduct as to the claims process here does not support the imposition of attorney's fees. For one thing, even though that process plainly was conducted in bad faith, many, if not all, of plaintiff's claims would have been denied – and, in *some instances*, should have been denied – even in a perfectly fair process. This court said as much in its prior opinion, in which it rejected much of the *relief* originally requested by plaintiff in its CDA claims, including plaintiff's claim that it was entitled to

> damages for the loss of its business value, by far the most dollar-intensive of its claims.

Pet. App. 18a-19a (emphases added). The denied "claims" to which this passage refers were thus petitioner's *damages* claims; not its substantive claims for relief, on which petitioner substantially prevailed. The CFC could not have been more clear in finding gross misconduct by the government and furthermore by ruling in petitioner's favor on the majority of its claims. *See supra*; App. A, B.

But in any event, whether and to what extent the CFC ruled for petitioner on various claims or awarded particular damages is irrelevant as a matter of law to petitioner's entitlement to fees. To the extent the United States is correct that the CFC held that a party's right to fees depends on whether it wins its case in court, *id.* 2, that ruling squarely conflicts with this Court's precedents. "'The imposition of sanctions under the bad-faith exception' at common law thus 'depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.'" BIO 5 (quoting *Chambers v. NASCO*, 501 U.S. 32, 53 (1991)). Here, "during the" mandatory adjudication of petitioner's claims before the contracting officer, the government "conducted itself" in absolute bad faith. As a result, petitioner could receive a fair adjudication of its claims only by litigating before the CFC.

There is no more merit to the United States's closely related assertion that petitioner failed "to demonstrate a causal link between the relevant bad faith and the fees it ultimately incurred." BIO 10. The United States characterizes the CFC as stating that, because petitioner would not have prevailed on

its largest damages calculations in even a fair contracting process, *see supra*, the government's misconduct did not "cause[] petitioner to incur additional litigation expenses." BIO 6 (citing Pet. App. 18a-19a). That is inaccurate: as noted, it is undisputed that the government acted in bad faith in the administrative proceedings. That misconduct is itself a part of the litigation process for purposes of a fee award, *see Sullivan*, *supra*, and moreover forced petitioner to litigate in the CFC.

The CFC instead said far more narrowly that even if the government had acted in good faith petitioner inevitably would have lost on some claims and presumably would have gone to court to litigate at least some issues – *viz.*, petitioner could not have "*avoided this action* and the significant expenditure of judicial resources it entailed." Pet. App. 19a (emphasis added). The facts that petitioner would inevitably have litigated *some* questions before the CFC in even a fair contracting process, *id.*, or that petitioner's claims should have been denied in "some instances" and that the court did not agree entirely with petitioner's requested "relief," *id.*, obviously does not immunize the government from the consequences of its admitted bad faith misconduct for the many claims that petitioner was forced to litigate because of the government's bad faith. *See* App. A, *infra*. There has been no determination of the "causal link" between the government's misconduct in the administrative proceedings and certain fees claimed by petitioner, *see* BIO 10, only because the CFC categorically held that fees are unavailable *even when* such a causal link does exist. As explained in the petition, at 28-29, an appropriate award on remand could be limited to the specific fees that are

"traceable to the [government's] bad faith." *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990).

Second, respondent's contention that because petitioner invoked the government's misconduct in pleading its claim that respondent "'breached its covenant of good faith and fair dealing,'" such misconduct "would not warrant an award of bad-faith fees," BIO 16 (quoting Pet. App. 19a), blurs the critical distinction between two very different aspects of the government's misconduct. Petitioner proved that Army officials breached the government's duty of "good faith and fair dealing" in performing the party's underlying contracts relating to the "housing project at Fort Wainwright." *Id.* 2. The government argues, and a number of circuits hold (though others do not, *see infra*), that such *primary conduct* is immune from an award of attorney's fees. *See id.* 15. But petitioner's eligibility for an award of fees relies principally on the distinct further fact that "the agency *claim process* 'was conducted in bad faith.'" *Id.* 6 (quoting Pet. App. 18a) (emphasis added). Even if the government were correct that its "conduct forming the basis for petitioner's *breach-of-contract claim* would not warrant an award of bad-faith fees," *id.* 16 (emphasis added), petitioner would remain eligible for the significant fees arising from the government's gross misconduct in the administrative proceedings, misconduct that was closely related to the judicial proceedings and necessitated the federal court litigation.

In any event, as the petition explained, at 26-27, it would be absurd to hold that a party which otherwise would be required to pay attorney's fees on the basis of its bad faith misconduct ironically is

automatically immunized from such an award whenever its bad faith *also* happens to be part of the substantive claim in the litigation. Obviously, a party may neither recover twice for the same harm nor recover if such a remedy were not intended. Here, if petitioner's substantive breach of contract claim were designed to account for its attorney's fees, petitioner could not also secure those fees under the court's inherent powers. But this is not such a case, which was litigated as an ordinary breach of contract action, in which petitioner could recover the litigation costs it incurred as a result of the government's bad faith only through its motion for attorney's fees. The EAJA also demonstrates that Congress did not otherwise intend to immunize the government from an award of fees for misconduct in the mandatory administrative adjudication of contracting disputes, at least when as here that misconduct is closely related to federal court litigation.

3. There also is no merit to the government's attempt to refute the CFC's own objective acknowledgment, *see* Pet. App. 14a-15a, that other circuits would have awarded petitioner its attorney's fees. The Third, Seventh, and Tenth Circuits agree with the categorical rule adopted below that fees may never be awarded for conduct that occurs outside the court proceedings. *See* Pet. 12-13. But other circuits reject that sweeping holding and would award fees in these circumstances. The United States itself has acknowledged that the CFC's decision was compelled by settled Federal Circuit precedent, which in turn refuses to follow contrary "out-of-circuit authority." *See* Pet. 10 (quoting Resp. C.A. Br. 10).

The D.C., Fourth, and Eleventh Circuits reject the government's position that fees cannot be awarded for bad faith primary conduct. *See* Pet. 13-16. The government attempts to draw thin factual distinctions, noting that the D.C. Circuit in one case "affirmed the *denial* of bad-faith fees," and in another awarded fees relating to misconduct in implementing "a consent order to settle a dispute," BIO 13-14, and furthermore that the misconduct authorizing a fee award in an Eleventh Circuit case occurred "during the litigation itself," *id.* 14. But the precise fact pattern of the individual cases did not drive the courts' legal holdings. The D.C. Circuit unambiguously holds that fees are available for "an aspect of the conduct giving rise to a lawsuit" when the litigant violated "a clear statutory or judicially imposed duty," *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991), which led the Federal Circuit itself to acknowledge the circuit conflict. *See* Pet. 14. The Eleventh Circuit expressly adopts the D.C. Circuit's standard and holds that fees are available for "bad faith *preceding* and during litigation." *Maritime Management Inc. v. United States*, 242 F.3d 1326, 1333 (11th Cir. 2001) (per curiam) (emphasis added). The United States next contends, at 14, that the Fourth Circuit's prior precedent has been superseded by *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), but that court has continued to consider such claims. *Williams v. Professional Transportation, Inc.*, 294 F.3d 607, 614 (4th Cir. 2002).

The Second, Fifth, Sixth, Eighth, and Ninth Circuits similarly reject the rule that fees may only be awarded for misconduct in the litigation itself, although they would hold that fees are unavailable

for a party's primary conduct – here, the underlying breach of contract. Most starkly, the Fifth and Ninth Circuits' holding that fees are available for misconduct in administrative proceedings squarely conflicts with the ruling below that "how an agency handles an administrative claim, Pet. App. 18a, is immune from a fee award. The United States acknowledges the Ninth Circuit's holding in *Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990), that fees may be awarded for misconduct in administrative proceedings, but it weakly attempts to suggest in a parenthetical that the ruling involved "agency actions taken *after* [the] suit for judicial review was filed in 1981." BIO 17. That is no distinction at all: much of the administrative misconduct in this case occurred after petitioner filed suit in the CFC. *See, e.g.*, Pet. App. 166a & n.71. But in any event, the government's characterization of *Brown* is not correct: in that case, the government's administrative misconduct "necessitated Brown's filing *the first action* in the district court." 916 F.2d at 496 (emphasis added). Further, the timing of the events was not relevant to the Ninth Circuit's holding that fees are available because – just as in government contracting cases – "[t]he process of review of benefit allowances . . . is statutorily defined" to include the administrative proceedings. *Id.*

The Fifth Circuit similarly would award fees for the government's bad faith "*response* to [petitioner's] substantive claim," without regard to whether that response occurred "before or after [this] action [was] filed." *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (emphasis in original). Notably, in two cases, the Fifth Circuit has specifically awarded fees for

governmental misconduct in administrative proceedings. *See* Pet. 17. The United States asserts that the Fifth Circuit's decisions "would not aid petitioner" because "the government defended the agency's decisions in this suit and largely prevailed in the CFC." BIO 17. For the reasons described *supra*, that assertion is factually incorrect and legally irrelevant: petitioner prevailed on two-thirds of its claims and was awarded nearly $2 million in damages; and eligibility for fees depends not on who wins or loses, but on whether a party acts in bad faith. Nothing in the decisions of the Fifth Circuit supports the government's asserted distinctions, and that court would award fees here in light of its express and repeated holding that misconduct in administrative proceedings is subject to an award of fees.

The government gains nothing from the Fifth Circuit's recognition that this Court in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), "did not grant a district court the power to police the administrative courts . . . when those courts do not threaten the court's own judicial authority or proceedings." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 593 (5th Cir. 2008). In this case, the administrative and judicial proceedings were integrally related, *cf. Sullivan v. Hudson*, *supra*, so much so that the CFC specifically found that the government's actions "threaten[] the integrity of the dispute resolution process." Pet. App. 160a. *Maxxam*, in stark contrast, involved a request for fees arising from an entirely separate "proceeding that was not before the district court . . . . addressed different legal issues and prosecuted six defendants who were not involved in the [district court] case." 523 F.3d at 593. The government further

acknowledges that *Chambers* left open "the question whether a federal court has 'inherent power to sanction [a litigant] for conduct relating to the underlying [claim]' at issue in a lawsuit," BIO 9, which it correctly recognizes as "an issue of broad and continuing importance," BIO 8.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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